

(COMMUNAL) LIFE, (RELIGIOUS) LIBERTY, AND PROPERTY

John J. Infranca*

2017 MICH. ST. L. REV. 481

ABSTRACT

Property rights and religious liberty seem to share little in common. Yet surprisingly similar claims have long been made on their behalf, including bold assertions that each of these two rights uniquely limits the power of the state and serves as the foundation for other rights. This Article reframes the conception of property rights and religious liberty as foundational by foregrounding communitarian aspects of each right. Property and religious freedom are a foundation for other rights, but in a different manner than traditional accounts suggest. It is not the individual exercise of these rights that provides a foundation for other rights, but rather the complementary roles these rights play in the formation of normative communities that, in turn, serve as counterweights to the state.

This Article makes three distinct contributions to the existing legal literature. First, it highlights the significant similarities in historical and theoretical conceptions of the foundational status of these two rights. Second, it integrates the developing scholarly literature on the communal and institutional nature of these two rights. Third, it builds upon this literature to contend that the right to property and religious freedom can indeed provide important foundations for rights more generally, but only if we sufficiently protect and nurture, through law, the communities and institutions

* Associate Professor of Law, Suffolk University Law School. This Article benefited from comments received during presentations at the Annual Law and Religion Roundtable at Stanford Law School; the Association for Law, Property, and Society Annual Meeting at the University of Georgia Law School; the Property Works-in-Progress Conference at Boston University School of Law; and the Association of American Law Schools' 2017 Annual Meeting. Special thanks to Erin Braatz, Hanoch Dagan, Nestor Davidson, Rashmi Dyal-Chand, Rick Garnett, Paul Horwitz, John Inazu, Diane Klein, Adam MacLeod, Julia Mahoney, Timothy Mulvaney, Eduardo Peñalver, and David Reiss for helpful suggestions and for feedback on prior drafts. Jessica Barton, Rachel Chunnha, Julianne DeLeo, Maegan O'Rourke, and Matthew Sirigu provided excellent research assistance. Thanks to the editors of the Michigan State Law Review for their fine work.

upon which these rights depend. The Article concludes by suggesting new approaches to assessing a diverse set of contemporary legal disputes: religious communities seeking to relocate in the face of local government opposition, Native American communities challenging government actions on sacred lands, and Sanctuary churches opposing immigration enforcement by sheltering individuals on their property.

TABLE OF CONTENTS

INTRODUCTION	482
I. PROPERTY AND RELIGIOUS FREEDOM AS	
FOUNDATIONAL RIGHTS	489
A. The Right to Property as a Foundational Right	492
B. Religious Liberty as a Foundational Right	497
C. Differences and Similarities.....	502
II. PROPERTY AND RELIGIOUS FREEDOM AS CONSTITUTIVE	
RIGHTS	506
A. Social Beings and Communal Contexts.....	507
B. Normative Communities and Individual Identity	513
C. Normative Communities and Challenges to the State	518
D. The Risk of Exclusion and Discrimination	522
III. DOCTRINAL IMPLICATIONS	527
A. Religious Community v. State	528
1. <i>Making Space for Religious Communities and</i>	
<i>Their Members: RLUIPA</i>	528
2. <i>Protecting Identity: Native American Sacred Land</i> ..	532
3. <i>Challenging the State: Sanctuary Churches</i>	535
B. The Right to Property and Religious Freedom at the	
Individual Level	540
CONCLUSION	544

INTRODUCTION

At first blush, property rights and religious freedom appear to share little in common. The former concern the possession, use, and disposition of (traditionally) material goods and land.¹ The latter

1. JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 31-32 (1988) (“The concept of property is the concept of a system of rules governing access to and control of material resources.”); *c.f.* J. Peter Byrne, *What We Talk About When We Talk About Property Rights – A Response to Carol Rose’s Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 1049, 1051 (1996) (“[P]roperty is an

deals instead with the intangible realm of belief and the freedom of conscience.² Upon deeper reflection, such simplistic formulations break down. Property rights are asserted in intangible creations, and the free exercise of religion includes, in part, activities in the physical world. But the basic point remains: These are very different rights not often discussed together, at least in contemporary discourse. Yet these seemingly disparate rights together figured prominently in the conception of limited government embraced by members of the Founding generation, most notably James Madison.³ The American experiment was grounded in a rejection of twin strictures of the past in the form of religious establishments and feudal property.⁴

In addition, intriguingly similar (and frequently grandiose) claims have long been made regarding the importance of these two rights. These include assertions that each of these rights serves as a foundation for the recognition and protection of individual rights more generally.⁵ Along these lines, the right to property has been

institution designed to mediate claims among competing claimants (usually private) for resources; constitutional rights, by contrast, such as the free exercise of religion, are intentionally designed to mediate between a private party and the State.”).

2. See Note, *Toward A Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1058 (1978) (“The free exercise clause was at the very least designed to guarantee freedom of conscience by preventing any degree of compulsion in matters of belief.”).

3. See JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM* 210-11 (1990) (arguing that while Madison invoked freedom of religion in some of his earliest discussions of limited government, it was property that primarily shaped his “conception of constitutional government”).

4. See *id.* at 210 (“Religious persecution had brought many to the colonies in the first place, and conflicts over religious freedom continued to arise in the new land.”); GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY* 51 (1997) (arguing that for republican lawyers during the Founding period “feudalism and feudal property were the dominant symbols for the past that was rejected or, rather, transcended”); Stanley N. Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J.L. & ECON. 467, 471-73 (1976) (discussing Jefferson’s efforts to abolish primogeniture and entail).

5. See Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1890-91 (2005) (“The claims often made on behalf of private property are truly extraordinary. Theorists do not merely make the familiar utilitarian arguments that private ownership is important because it creates incentives for productive activity. They frequently make the far more dramatic claim that property rights must be protected because they constitute the very foundation for many other liberties citizens enjoy.”). Such claims are made by authors at widely different places along the ideological spectrum. See, e.g., JEDEDIAH PURDY, *THE MEANING OF PROPERTY* 109 (2010) (“Without enforceable rights in resources, cooperation stalls or breaks down, insecurity grows, and freedom shrinks in all its dimensions.”); AYN RAND,

described as “the guardian of every other right,”⁶ “a guarantor of liberty,”⁷ “the basis of power” in democracy,⁸ “the fountainhead of personal liberty,”⁹ “the foundation of civil liberty,”¹⁰ “the keystone right,”¹¹ and “an essential pre-condition to the realization of other basic civil rights and liberties.”¹² Classical liberal accounts of property rights highlight their role in promoting individual liberty and self-determination and insulating property owners from intrusions by the state. They suggest that property rights provide a bulwark between the individual and the state, enabling an economic independence that frees individuals from coercion. Property rights thereby serve as a necessary precondition for the exercise of other liberties, enhancing individual dignity and fostering a richly pluralistic society.

Similarly bold language is invoked in reference to religious freedom, which has been declared “the mother of many other

THE VIRTUE OF SELFISHNESS 110 (1964) (“Without property rights, no other rights are possible.”); see also Eric T. Freyfogle, *Property and Liberty*, 34 HARV. ENVTL. L. REV. 75, 75-76 (2010) (“In the ongoing discussion about private property and whether government does or does not respect it adequately, it is widely assumed (i) that property is an essential component or protection of individual liberty, and (ii) that liberty increases in fullness the more firmly we protect property against governmental restrictions or invasions.”).

6. JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 26 (3d ed. 2008).

7. JAMES M. BUCHANAN, *PROPERTY AS A GUARANTOR OF LIBERTY* 59 (1993).

8. This phrase was invoked in 1787 in a paper supporting adoption of the Constitution. See Noah Webster, *An Examination of the Leading Principles of the Federal Constitution*, in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 59 (Paul Leicester Ford ed., 1888) (“Wherever we cast our eyes, we see this truth, that *property* is the basis of *power*; and this, being established as a cardinal point, directs us to the means of preserving our freedom.”).

9. ELY, *supra* note 6, at 172 (“Drawing on the property-centered constitutional philosophy of John Locke, Americans have long seen individual property rights as the fountainhead of personal liberty and political democracy.”).

10. *Parham v. Justices of Inferior Court*, 9 Ga. 341, 355 (1851) (“The right of accumulating, holding and transmitting property, lies at the foundation of civil liberty. Without it, man no where rises to the dignity of a freeman. It is the incentive to industry, and the means of independent action. It is in vain that life and liberty are protected—that we are entitled to trial by Jury, and the freedom of the press, and the writ of *habeas corpus*—that we have unfettered entails, and have abolished primogeniture—that suffrage is free, and that all men stand equal under the law, if property be held at the will of the Legislature.”).

11. Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 329 (1996).

12. *Shelley v. Kraemer*, 334 U.S. 1, 10 (1948).

rights,”¹³ the “source and synthesis of . . . rights,”¹⁴ the “[g]reat [b]arrier,”¹⁵ and the “first freedom.”¹⁶ As with property, religious liberty is ascribed a distinct role as an important limit on the power of government actors that shields other individual rights from the reach of the state.¹⁷ Both rights are attributed central roles in the historical development of the concept of limited government and the recognition and evolution of other individual rights.¹⁸ These rights also represent paradigmatic examples of complementary spatial and transcendental dimensions of liberty that the Supreme Court distinguished in *Lawrence v. Texas*.¹⁹

Taken on its own terms, the claim that the individual exercise of either of these rights provides a practical check on the power of the state and, by itself, can protect individual rights more generally seems decidedly implausible. For, like all individual rights, the right to property and religious freedom depend upon the state and its institutions for their recognition and their vindication.²⁰ Nonetheless,

13. John Witte Jr., *A Dickensian Era of Religious Rights: An Update on Religious Human Rights in Global Perspective*, 42 WM. & MARY L. REV. 707, 717 (2001) (quoting GEORG JELLINEK, DIE ERKLÄRUNG DER MENSCHEN-UND BÜRGERRECHTE: EIN BEITRAG ZUR MODERNEN VERFASSUNGSGESCHICHTE 42 (1895)).

14. Letter from John Paul II, Pope, Centesimus Annus, to his Venerable Brother Bishops in the Episcopate, et. al. ¶ 47 (1991).

15. See *infra* note 77 and accompanying text (discussing James Madison’s use of phrase).

16. See Michael W. McConnell, *Why Is Religious Liberty the “First Freedom”?*, 21 CARDOZO L. REV. 1243, 1243 (2000).

17. See *infra* notes 91-95 and accompanying text.

18. See *infra* notes 51-55, 93-95 and accompanying text.

19. 539 U.S. 558, 562 (2003) (“Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.”).

20. See *infra* notes 119-120 and accompanying text. My focus here is on the role of the state in enforcing and vindicating rights, rather than on the source of rights. As such I put to the side consideration of natural rights theories of religious freedom and property rights. My own inclinations in this regard are similar to those of Laura Underkuffler, who contends that with regards to freedom of religion (and freedom of speech), the state’s role “[i]s at best protecting, and at worst oppressing, but whatever its stance, it is—essentially—an external one. The state does not create these freedoms, nor allocate them to us. It simply protects—or destroys—what we, as human beings, would otherwise freely, naturally, and equally enjoy.” Laura S. Underkuffler, *When Should Rights “Trump”? An Examination of Speech and*

the right to property and religious freedom do make valuable and distinct contributions to the recognition and security of individual rights more generally. But, I argue, they do so in a very different way than traditional accounts suggest. These rights play important and at times complementary roles in supporting communities and institutions that foster the development of individual identity and enable the exercise of other rights.

In his seminal article *Nomos and Narrative*, Robert Cover identified the roles that property law and the Free Exercise Clause play in creating boundaries that enable insular communities to develop distinct ideologies and to constitute “an integrated world of obligation and reality from which the rest of the world is perceived.”²¹ This Article builds on these insights to argue that normative communities sustained by the right to property and religious liberty also play a crucial and underappreciated role in protecting individual rights more generally, both for members of the community and for the broader society. They do so in two seemingly contradictory ways: by fostering certain democratic virtues, and, at times, by consolidating efforts to challenge public norms in the name of vindicating individual rights. Consequently, the claim that the right to property and religious liberty are uniquely important for the recognition of a broader set of individual rights is only convincing in

Property, 52 ME. L. REV. 311, 321 (2000). In contrast, property rights, as Underkuffler writes, “are rarely the simple protection of natural and preexisting human freedoms; they are almost always *positive* rights, *allocative* rights.” *Id.* at 321. There are, of course, defensible philosophical accounts of natural property rights. These include, as Jeremy Waldron has framed it, a view of property rights as natural rights

not in the sense that the individuals concerned are born with them (in one of the ways that, say, rights to life and liberty are said to be natural), but rather in the sense that the force of these rights obtains and can be recognized as valid by moral and rational people quite apart from any provisions of positive law.

WALDRON, *supra* note 1, at 19; *see also id.* at 138 (discussing Locke’s understanding of property rights as natural right). Madison, for his part, distinguished between property rights and rights of conscience on this point: “Conscience is the most sacred of all property; other property depending in part on positive law, the exercise of that, being a natural and inalienable right.” Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 135 (1990) (quoting James Madison, *Property*, in 6 THE WRITINGS OF JAMES MADISON 101 (G. Hunt ed., 1906)).

21. *See* Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 31 (1983).

a society that provides sufficient protection to the communities and institutions through which these rights are exercised.

In recent years scholars of both religious liberty and property rights have emphasized communal aspects of each of these rights. In the context of religious freedom, a number of scholars have developed sophisticated, but controversial, theories of institutional free exercise rights.²² The Supreme Court recognized a version of such rights in *Hosanna Tabor Evangelical Lutheran Church and School v. EEOC*.²³ In the area of property rights, scholars within the “Progressive Property” movement have developed theoretical accounts that place renewed emphasis on the communal nature of property rights and of property itself. A subset of these scholars, who propose a human flourishing account of property, contend that a social-obligation norm is intrinsic to the institution of property and imposes upon owners certain communal duties.²⁴ This Article seeks to place these seemingly quite distinct subjects and sets of literature in conversation and in doing so to examine the complementary roles that property rights and religious freedom play in the formation of a range of normative communities. It is the activities of these communities, rather than the individual exercise of either right, that provide a counterweight to the power of the state and hence serve to vindicate a broader set of rights. These communities create the

22. See, e.g., PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS 174-75 (2013); Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 274 (2008); sources cited *infra* notes 142-148 and accompanying text.

23. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 189 (2012). The Court declared that “the text of the First Amendment . . . gives special solicitude to the rights of religious organizations.” *Id.* at 132. In an earlier Article, I argued that *Hosanna-Tabor* should be read to reflect “[a]n intrinsic theory of institutional free exercise, which would define the scope of protections provided to religious institutions based upon the institution’s distinct religious exercise and not the interests or religious exercise of individual members.” John J. Infranca, *Institutional Free Exercise and Religious Land Use*, 34 CARDOZO L. REV. 1693, 1726 (2013). Richard Schragger and Micah Schwartzman, in an important critique of institutional rights, argue that religious institutions should not be understood to have rights that are not derivative of their members. Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 921 (2013). For purposes of my arguments in this Article, it is not necessary to distinguish between the potential sources of a religious institution’s rights.

24. See, e.g., Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 769 (2009); Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQUIRES L. 127, 134 (2009); sources cited *infra* at notes 127-141.

space—both literally and figuratively—within which social norms and virtues are fostered and individual identities are shaped. Such communities also better secure the independence necessary to challenge the state on the basis of distinct normative commitments.

A renewed appreciation of the role that property rights and religious freedom play in the formation of such communities can revive and rehabilitate claims that these rights provide a foundation for other rights. It also yields a number of insights for existing legal doctrine, particularly in the context of a range of contemporary disputes involving both property rights and religious freedom: Muslim communities confronting opposition from local governments as they seek to locate cemeteries or mosques;²⁵ Native American communities challenging government actions on sacred lands;²⁶ and religious communities within the New Sanctuary Movement using their property to provide shelter to individuals facing deportation, in direct violation of federal immigration laws.²⁷ Careful consideration of the complex interaction of property rights, religious liberty, and communal identity can help shape a more sophisticated theoretical account of the value of enhanced legal protections for religious land uses, a critique of the inadequate protection of Native American sacred sites under current doctrine, and a framework for evaluating the communal religious identity and exercise at stake in the Sanctuary Church movement. A more communal approach to these rights also suggests the need to reassess declarations that the right to property and religious liberty are secondary²⁸ or redundant²⁹ rights. For such assessments fail to appreciate the role these rights continue to play as foundations for rights more generally.

This Article proceeds in three parts. Part I provides a brief descriptive account of the ways in which these rights have been understood as foundational for rights more generally. I first review

25. See *infra* Subsection III.A.1.

26. See *infra* Subsection III.A.2.

27. See *infra* Subsection III.A.3.

28. See ELY, *supra* note 6, at 126 (asserting that struggle over legality of New Deal programs led to separation of personal liberties from property rights and assignment of secondary constitutional status to latter, counter to framers' beliefs); Mary Ann Glendon, *Religious Freedom—A Second-Class Right?*, 61 EMORY L.J. 971, 971 (2012) (exploring the question of “whether religious freedom is becoming . . . a lesser right—one that can be easily overridden by other rights, claims, and interests”).

29. See Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 LOY. U. CHI. L.J. 71, 73 (2002) (arguing that “[c]ontemporary constitutional doctrine may render the Free Exercise Clause redundant”).

historical accounts of the relationship between each of these rights and other rights and then examine arguments that these rights play distinct roles in limiting the power of government actors and protecting the exercise of other rights. Part II shifts to a discussion of communal conceptions of each of these rights. I argue that while the grand claims made on behalf of the right to property and religious freedom at times seem to offer little more than rhetorical flourish, these rights are foundational for other rights in a less direct, but no less important, way than the bold declarations made on their behalf might suggest. The right to property and religious freedom provide a foundation for other rights by supporting the formation of normative communities through which individuals, as bearers of rights, form their identity, and that serve, through the individual and communal actions of their members, as important counterweights to the power of the state. Finally, Part III explores a few implications of the account in Part II for specific areas of legal doctrine. The primary examples in Part III involve the property rights of religious communities, which are often the thickest normative communities and which provide an opportunity to examine the synergistic relationship between these rights. Finally, I suggest potential implications for individual rights claims.

I. PROPERTY AND RELIGIOUS FREEDOM AS FOUNDATIONAL RIGHTS

What does it mean to claim a particular right serves as a “foundation” for other rights? There are a few potential interpretations relevant to the discussion that follows. First, these two rights can be understood as foundational in a historical sense, both through their contributions to the concept of limited government generally and through more direct relationships with particular rights.³⁰ This account suggests that a failure to appreciate and adequately protect these particular rights might contribute to, or simply reflect, a lack of respect for rights more generally. A second and related interpretation frames these rights as foundational to the extent they continue to play distinct roles in limiting the scope and power of the state, enabling the exercise and flourishing of other rights. At the risk of mixing metaphors, this is what I term an

30. C.f. Jeremy Waldron, *Is Dignity the Foundation of Human Rights?*, 12-13 (N.Y.U. Pub. Law & Legal Theory Res. Paper Series, Working Paper No. 12-73, 2013) (identifying historical dependence as one among a set of possibilities for how one concept might be understood to be the foundation for another).

“infrastructural” conception of a right as foundational. Part II examines this conception more closely in relation to the communal exercise of property rights and religious liberty. Third, these two rights might be understood as necessary (although not sufficient) “pre-condition[s]” for the exercise of other rights.³¹ Finally, a fourth interpretation might frame these rights as foundational in a more instrumental fashion, which relates to the third understanding.³² A state that embraces particular values, such as individual autonomy, human dignity, and democratic governance, might deem the recognition of particular rights an important or necessary foundation for efforts to secure these values.

In this Part, I survey historical and theoretical claims regarding the roles that the right to property and religious freedom each play as a foundation for other rights. These claims have typically been framed in relation to the individual exercise of these rights.³³ Taken on their own terms, these claims are implausible, or at the very least insufficient, for a series of reasons discussed in Section I.C. Nonetheless, they provide important insights into the distinct roles these rights play in support of normative communities that serve many of the foundational roles ascribed to these two rights.³⁴ These communities do so by facilitating a communal and social infrastructure that supports the exercise of a broader set of individual rights.³⁵ As such they play roles reflective of the second and third understandings of a foundation outlined above: as limits on the power of the state and pre-conditions for the exercise of other individual rights.³⁶

This understanding need not entail the position that the foundational right is superior to or should always take precedence over other rights.³⁷ Moreover, we might recognize multiple

31. See *Shelley v. Kraemer*, 334 U.S. 1, 10 (1948); cf. MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 10 (1962) (“History suggests only that capitalism is a necessary condition for political freedom. Clearly it is not a sufficient condition.”).

32. See *infra* notes 299-300 and accompanying text.

33. See *infra* Section I.A.

34. See Peñalver, *supra* note 5, at 1917.

35. See *id.* at 1900.

36. See *supra* note 31 and accompanying text.

37. Ely himself, while arguing that property rights have inappropriately been relegated to a lesser constitutional status than personal rights, concedes that “the Constitution seeks to protect several fundamental values, including economic interests, but property is not entitled to preferential treatment.” ELY, *supra* note 6, at 9. But see Carol M. Rose, *The Guardian of Every Other Right: A Constitutional History of Property Rights*, 10 CONST. COMMENT. 238, 240 (1993) (book review)

foundational rights of equal status. In fact, the right to property and religious freedom are not the only rights that have been deemed foundational. Others include speech,³⁸ assembly,³⁹ and the right to vote.⁴⁰ Even the phrase the “guardian of every other right,” before Arthur Lee used it to refer to property, was invoked in reference to freedom of speech in the Virginia Resolutions of 1798.⁴¹

Nonetheless, the right to property and religious freedom have played particularly significant, recurring, and frequently analogous

(asserting that the conception of property as “the guardian of every other right” implies “that property is not just *equal* in status with other rights, but *takes precedence* over all others”).

38. See *Palko v. Connecticut*, 302 U.S. 319, 327 (1937) (“Freedom [of thought and speech], one may say [] is the matrix, the indispensable condition, of nearly every other form of freedom.”); Lee C. Bollinger, *The Tolerant Society: A Response to Critics*, 90 COLUM. L. REV. 979, 980, 983-85 (1990) (citing free speech as an especially important right because it preserves autonomy, checks governmental abuses, advances access to truth, and especially creates an attitude of tolerance and self-restraint); cf. Richard Epstein, *Property, Speech, and the Politics of Distrust*, 59 U. CHI. L. REV. 41, 49-50 (1992) (emphasizing the role of freedom of speech in enabling one to challenge government action).

39. See JOHN D. INAZU, *LIBERTY’S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY* 56 (2012). Inazu recounts that in the late 1930s Dorothy Thompson, a prominent journalist, gave a speech on the freedom of assembly and its relationship to freedoms of speech, religion, and the press. She declared:

The right to meet together for one purpose or another is actually the guaranty of the three other rights. Because what good is free speech if it impossible to assemble people to listen to it? How are you going to have discussion at all unless you can hire a hall? How are you going to practice your religion, unless you can meet with a community of people who feel the same way? How can you even get out a newspaper, or any publication, without assembling some people to do it?

Id.

40. See *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (“[T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights”); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (“[The right to vote] is regarded as a fundamental political right, because preservative of all rights.”); see also JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 293 (1996) (noting “preeminent importance” given to rights to representation and to jury trial during Colonial period, on theory that if “left to operate in full force, they would shelter nearly all the other rights and liberties of the people”).

41. Expressing its objections to the Alien and Sedition Acts, the Virginia General Assembly decried an assault against “that right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed, the only effectual *guardian of every other right*.” *Virginia Resolutions*, 21 December 1798, FOUNDERS ONLINE (June 29, 2017), <https://founders.archives.gov/documents/Madison/01-17-02-0128> [<https://perma.cc/ZQW4-K4JW>] (emphasis added).

roles in conceptions of limited government.⁴² The end of feudalism and the division of social life into a private economic sphere of property and a public political sphere⁴³ mirrors an earlier separation of ecclesial and temporal power.⁴⁴ This Part first examines historical and theoretical accounts of how either the right to property or religious freedom provides a foundation for the recognition and protection of other individual rights. To group them into broad (but overlapping) categories, these include claims that: the right to property or religious freedom limits the power of the state, enabling the exercise and flourishing of other rights; that these rights foster a degree of independence and autonomy; and that, historically, the recognition of other rights depended in some way upon the right to property or religious freedom. Part I concludes by discussing a few critiques of claims that the individual exercise of either of these rights provides a sturdy foundation for rights more generally.

A. The Right to Property as a Foundational Right

In his *Second Treatise on Civil Government*, John Locke asserted that “the preservation of . . . property” is the “great and chief end” of government.⁴⁵ Locke used the term “property” quite broadly to include “lives, liberties, and estates.”⁴⁶ It is to escape the inconvenience and uncertainty of the state of nature that individuals surrender a certain degree of their liberty so as to better secure this property.⁴⁷ As such, one’s property cannot be taken by the state without one’s consent, for allowing such to occur would defeat the very end for which one enters into society.⁴⁸

Influenced by Locke, colonial leaders deemed the protection of property “crucial to the preservation of freedom.”⁴⁹ The Declaration

42. See NEDELSKY, *supra* note 3, at 210.

43. See MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 294 (1983) (describing how abolition of feudal rights “established one of the crucial divisions along which social life is organized today”).

44. See *infra* notes 95-98 and accompanying text.

45. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 124.

46. *Id.* at §§ 87, 123.

47. *Id.* at §§ 127, 131.

48. *Id.* at §§ 138, 222 (asserting that when government arbitrarily takes away property it loses its legitimacy and claim to obedience).

49. See ELY, *supra* note 6, at 28; see also WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 191-92 (Rita & Robert Kimber trans., expanded ed. 2001) (“The first state constitutions . . . clearly emphasized the

of Independence reframed Locke's phrase "life, liberty, and estates" as "life, liberty, and the pursuit of happiness"; however, this change does not signify a rejection of the importance of property rights, as happiness was "generally equated with economic opportunity" in the eighteenth century, and "[t]he right to obtain and possess property was at the heart of the pursuit of happiness."⁵⁰ Madison, for his part, sought to include property in a prefix to the Constitution, which would have declared, "government is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, *with the right of acquiring and using property* and generally of pursuing and obtaining happiness and safety."⁵¹ According to Madison, "the rights of persons and the rights of property" constituted the "two cardinal objects of government," which were to be balanced by a division of power between the lower and upper houses of the legislature.⁵²

Of particular interest for the discussion at hand, while Madison and other Federalists invoked property rights as an important limit on government action, "some of Madison's most striking early statements about limited government referred not to property, but to freedom of religion."⁵³ Jennifer Nedelsky attributes this in part to the greater familiarity early Americans had with government restrictions on religious freedom than with threats to property.⁵⁴ Nonetheless, although fear of religious oppression may have provided the initial motivation for concerns regarding government intrusion on individual rights, it was property that became the focus of this concern and of how the Founders crafted the Constitution to address it.⁵⁵ Protections for property, then, served not as, in the words of John

individual's claim to legal protection of his property."); JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 27 (1986) ("In the eighteenth-century pantheon of British liberty there was no right more changeless and timeless than the right to property.").

50. ELY, *supra* note 6, at 28-29.

51. NEDELSKY, *supra* note 3, at 17 (quoting James Madison, Speech in the House of Representatives (June 8, 1789)) (emphasis added).

52. James Madison, Observations on Jefferson's Draft of a Constitution for Virginia in Works of Madison (Oct. 15, 1788).

53. NEDELSKY, *supra* note 3, at 210 (citing Madison's Memorial and Remonstrance).

54. *Id.* ("[T]hreats to freedom of religion, not property, were the form of government tyranny originally most familiar to Americans.").

55. *Id.* at 211; see also RAKOVE, *supra* note 40, at 314 ("Although other classes of rights still concerned Madison, his analysis of the dangers to property was paradigmatic for the program of reform he carried to Philadelphia in May 1787.").

Ely, “the principal function of government” for the Founders, but rather as an important means for achieving democratic governance and protecting rights more generally.⁵⁶

In addition to limiting government power, the preservation of property rights was understood as ensuring the independence of individuals who possessed property.⁵⁷ As legal historian Hendrik Hartog has noted, in the seventeenth and eighteenth centuries, property was seen as “a guarantee of independence,” necessary to protect from “the political dependence upon others which constitutes corruption.”⁵⁸ Property did not merely provide an alternative source of power that enabled resistance.⁵⁹ Rather it was believed to enable the development of a distinct personality, an autonomous identity significantly free from external forces and representative of a “classical notion of citizenship.”⁶⁰ Property guaranteed independence

56. ELY, *supra* note 6, at 28. As Stanley Katz remarks: The “American revolutionaries,” and Jefferson in particular, “did not defend property as an end in itself but rather as one of the bases of republican government.” Katz, *supra* note 4, at 470.

57. HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870, at 24 (1983).

58. *Id.* (quoting J.G.A. Pocock, POLITICS, LANGUAGE, AND TIME 92 (1973)).

59. *See id.*

60. *Id.* (“Property made it possible for a person to shape an identity rather than to be shaped by external forces.”). The association between property and freedom can be traced back further than the seventeenth century. As theologian Jean Porter observes, property and personal freedom were increasingly associated during the late medieval period. JEAN PORTER, NATURAL AND DIVINE LAW 260 (1999). Porter notes that at the same time, as property was linked with the exercise of power over others, the lack of property—poverty—was associated with servitude and powerlessness. *Id.* Ben Barros discusses a similar argument, which he frames as the claim “that private property is necessary to give people access to resources to be free.” D. Benjamin Barros, *Property and Freedom*, 4 N.Y.U. J.L. & LIBERTY 36, 51 (2009). According to Barros, this claim rests on two points:

First, with the exception of the barest forms of negative freedom, freedom is an empty concept if a person does not have the resources to act (or refrain from acting) consistent with that freedom. Second, absent private property, people will be beholden to others for the resources that they need to live their lives, and as a result will be unable to act independently and freely.

Id.; cf. WALDRON, *supra* note 1, at 300 (“[T]he connection (if one exists) between liberty as independence and the idea of private property helps explain the view, common until the middle of last century, that the ownership of property was an indispensable qualification for ownership and for the franchise.”).

(at least for those who possessed it) in part by limiting government action.⁶¹

The conception of property as a source of independence is perhaps most easily grasped in relation to the home and, to an extent, real property more generally.⁶² As William Pitt vividly declared:

The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter—the rain may enter—but the King of England cannot enter!—all his force dares not cross the threshold of the ruined tenement!⁶³

This vision rests upon a fiction of sorts, for it is only the king's willingness to recognize and respect the individual's property rights (and the rule of law more generally) that keep his forces from entering. Yet property's independence-conferring role need not be limited to a shield against coercion. Property as an institution also confers important democratic virtues, as a number of the Founders emphasized.⁶⁴

Recognizing the relationship between property, power, and autonomy, John Adams argued for the need to ease the acquisition of property, reasoning that “[i]f the Multitude is possessed of the Ballance of real Estate, the Multitude will have the Ballance of Power, and in that Case the Multitude will take Care of the Liberty, Virtue, and Interest of the Multitude in all Acts of Government.”⁶⁵ In a similar vein, Jefferson advocated for a wide distribution of property in significant part for its political value in relation to republican

61. See LOCKE, *supra* note 45, at § 138.

62. Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1353 (1993) (“Compared to other resources, land remains a particularly potent safeguard of individual liberty. Like no other resource, land can provide a physical haven to which a beleaguered individual can retreat. A land sanctuary directly serves a variety of so-called ‘negative’ liberties.”); see also HARTOG, *supra* note 57, at 24 (“Not all forms of property served equally well to guarantee individual autonomy. Real property, by its permanence and its creation of a spatial analogue for personal autonomy, had a preferred position.”).

63. Lord Brougham, *Lord Chatham*, in HISTORICAL SKETCHES OF STATESMEN WHO FLOURISHED IN THE TIME OF GEORGE III 42 (1855). See Ellickson, *supra* note 62, at 1353 (“Whenever a landowner can credibly threaten to withdraw into self-employment on his own land, private property in land helps protect a worker from overreaching by employers or state officials.”).

64. See *Letter from John Adams to James Sullivan*, May 26, 1776, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Adams/06-04-02-0091> [<https://perma.cc/THE8-XAH6>] (last visited Oct. 23, 2017).

65. *Id.*

government.⁶⁶ The capacity to tend one's own soil and supply one's own needs, Jefferson contended, fosters virtue and enables one to avoid the dependence that "begets subservience and venality [and] suffocates the germ of virtue."⁶⁷ These accounts reflect a more instrumental understanding of property rights, rather than a conception of the protection of property as the chief end of government.

The role of property in promoting independence and diffusing power is central to contemporary libertarian theories of private property, although such theories often downplay the instrumental understanding central to earlier accounts.⁶⁸ The concentration of property, it is argued, can create dependence on others, rendering an individual subject to coercion.⁶⁹ In contrast, the diffusion of power (and property) fosters independence, including in the political realm.⁷⁰ By providing "an alternative source of power to politics," private property enables an "array of civil and political liberties."⁷¹

It is not only real property that plays this role. As Robert Ellickson has asserted, "private ownership of any valuable resource—not just land, but also a bank account, a pension, or a

66. See Katz, *supra* note 4, at 470-73; see also ALEXANDER, *supra* note 4, at 27 (distinguishing Jefferson from Lockean tradition on grounds that for Jefferson property rights were in significant part social creations).

67. Thomas Jefferson, *Notes on the State of Virginia, Query XIX*, AVALON PROJECT, http://avalon.law.yale.edu/18th_century/jeffvir.asp [<https://perma.cc/ER8L-T796>] (last visited Oct. 23, 2017); see also Katz, *supra* note 4, at 475 ("It was the virtue and judgment produced by . . . independent labor that rendered [small, freeholding farmers] capable of becoming republicans, and therefore rendered America capable of republican government.").

68. Alexander and Peñalver argue that contemporary libertarians invert Locke's understanding of the relationship between property and democratic political theory. See GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, *AN INTRODUCTION TO PROPERTY THEORY* 36 (2012). They read Locke's theory of property as instrumental and in service to his "defense of democratic self-government against pretensions of monarchical absolutism." *Id.*

69. See F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 141 (1960); see also BUCHANAN, *supra* note 7, at 32 (1993) (arguing individuals might exercise power of exit to avoid or escape from exploitative economic relationships).

70. See Rose, *supra* note 11, at 345 ("The central idea of the Independence Argument is that property removes people's dependence on others, and fundamental autonomy makes them capable of exercising unencumbered judgment in the political forum. Hence all political powers, and certainly all the other rights, depend on the right to property.").

71. *Id.* at 340; see also FRIEDMAN, *supra* note 31, at 9-10 (arguing that private property, even in the context of Tsarist Russia, "provided some check to the centralized power of the state").

professional license—can confer the economic independence that permits genuine political and social choice.”⁷² In making the case for due process protections for government benefits, Charles Reich claimed that “property performs the function of maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner. . . . Civil liberties must have a basis in property, or bills of rights will not preserve them.”⁷³ Striking down racially restrictive covenants in *Shelley v. Kraemer*, the mid-twentieth century Supreme Court affirmed an important role for property rights in securing liberty more generally.⁷⁴ The Court declared that the framers of the Fourteenth Amendment deemed property rights “an essential precondition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee.”⁷⁵

To summarize, the protection of property was considered a principal purpose of government by many of the Founders. Private property was understood to play a vital role in ensuring the independence of individual citizens and fostering civic virtues, thereby contributing to democratic governance more generally. It did so by imposing limits on the scope of government action, limits that in turn serve to protect a broader set of individual rights. A range of contemporary commentators continue to embrace and propound this vision of the unique role that individual property rights play in fostering independence and providing a foundation for civil rights more generally. However, as discussed below, these claims are decidedly implausible in the absence of adequate attention to the important communal elements of property rights.

B. Religious Liberty as a Foundational Right

In two separate discussions of religious freedom, Madison invoked the image of a “great barrier” that shielded religious liberty

72. See Ellickson, *supra* note 62, at 1352 n.178 and accompanying text (“Commentators as diverse as Thomas Jefferson, Walter Lippmann, Milton Friedman, and Charles Reich have identified private property as a primary, indeed often as the primary, foundation for individual freedom.”).

73. Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 771 (1964). Gregory Alexander frames Reich’s argument as a “[v]ariation[] of the republican version of the autonomy argument for property.” Gregory S. Alexander, *Property’s Ends: The Publicness of Private Law Values*, 99 IOWA L. REV. 1257, 1265 (2014).

74. 334 U.S. 1, 4 (1948).

75. *Id.* at 10.

from civil authority.⁷⁶ This barrier separates “the authority of human laws, and the natural rights of Man excepted from the grant on which all political authority is founded.”⁷⁷ For Madison, religious freedom was rooted in a pre-political duty of each individual.⁷⁸ This duty to the “Universal Sovereign” takes precedence over any duty to a particular Civil Society, and therefore exempts religion from that society’s legislative authority, implying a necessary limit on government power.⁷⁹ Madison’s account follows in the tradition of Locke’s *Letter on Toleration*, which emphasized the need “to distinguish exactly the business of civil government from that of religion and to settle the just bounds that lie between the one and the other.”⁸⁰ Locke’s formulation suggests that something akin to Madison’s “great barrier”⁸¹ constricts the scope of civil government and that religious freedom is beyond that scope.⁸²

76. JAMES MADISON, DETACHED MEMORANDA (1817) (“This act is a true standard of Religious Liberty: its principle the great barrier [against] usurpations on the rights of conscience.”). See JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS ¶ 2 (1785) (“The preservation of a free Government requires not merely, that the metes and bounds which separate each department of power be invariably maintained; but more especially that neither of them be suffered to overleap the great Barrier which defends the rights of the people.”).

77. See DETACHED MEMORANDA, *supra* note 76.

78. See MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, *supra* note 76, at ¶ 1 (“It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. . . . We maintain therefore that in matters of Religion, no mans right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance.”).

79. *Id.* at ¶ 2. John Noonan describes Madison’s “great [b]arrier” as the “space where civil society lacks competence.” See John T. Noonan, Jr., *Religious Liberty at the Stake*, 84 VA. L. REV. 459, 461 (1998) (arguing that for Jefferson and Madison “[t]he religious right is beyond the power of the state because a human being cannot give up his relation and responsibility to God”); see also Vincent Phillip Muñoz, *Two Concepts of Religious Liberty: The Natural Rights and Moral Autonomy Approaches to the Free Exercise of Religion*, 110 AM. POL. SCI. REV. 369, 369 (2016) (discussing how framers derived a natural right to religious liberty from duties to God, rather than from commitment to autonomy); cf. Witte, *supra* note 13, at 718 (“The classic faiths of the Book adopt and advocate human rights to protect religious duties. A religious individual or association has rights to exist and act not in the abstract, but in order to discharge discrete religious duties.”).

80. JOHN LOCKE, A LETTER CONCERNING TOLERATION (1689).

81. See *supra* note 76 and accompanying text (discussing James Madison’s use of phrase).

82. See LOCKE, *supra* note 80.

There is strong evidence suggesting that Madison and other Founders had a narrow conception of the religious freedom they believed exempt from regulation. Madison emphasized an individual duty to render “such homage and such only as he believes to be acceptable to him,” suggesting that freedom of belief and worship, at the very least, is included within the scope of this natural religious freedom.⁸³ In an essay titled “Property,” he distinguished between rights of conscience (which he refers to as a form of property)⁸⁴ and property rights in the more traditional sense: “Conscience is the most sacred of all property; other property depending in part on positive law, the exercise of that, being a natural and inalienable right.”⁸⁵

According to historian Jack Rakove, Madison (and Jefferson) believed “nearly the entire sphere of religious practice could be safely deregulated,” a view that led them to “identif[y] the one area of governance in which the realm of private rights could be enlarged by a flat constitutional denial of legislative jurisdiction.”⁸⁶ Rakove contends that Madison and Jefferson distinguished religious liberty from other civil rights in that the state lacked the capacity to act in relation to religion, while other civil rights “were essentially *procedural*; they assumed that government had the authority to act, but that it had to do so in conformity to the due process of law that legislatures and courts both followed.”⁸⁷ Political scientist Vincent Phillip Muñoz echoes this interpretation in a recent article: “The framers held that whatever belongs exclusively to [the natural right of religious liberty] remains beyond the government’s direct prohibition and regulation.”⁸⁸ Accordingly, while the subject of this natural right was deemed to be beyond the jurisdiction of the state,

83. See MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, *supra* note 76, at ¶ 1; see also *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977) (“[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one’s beliefs should be shaped by his mind and his conscience rather than coerced by the State.”).

84. As Hendrik Hartog notes, “[i]n the seventeenth and eighteenth centuries property was defined not simply as material possessions but as all the attributes of personality that created individuality.” HARTOG, *supra* note 57, at 23; see also Laura S. Underkuffler, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* 16 (2003) (citing sixteenth and seventeenth century sources that included personal liberties among “property”).

85. Underkuffler, *supra* note 20, at 135 (quoting James Madison, *Property*, in 6 *THE WRITINGS OF JAMES MADISON* 102 (Gaillard Hunt ed., 1906)).

86. RAKOVE, *supra* note 40, at 312.

87. *Id.*

88. Muñoz, *supra* note 79, at 371.

the scope of this right appears to have been quite narrow.⁸⁹ There was a consensus that it included belief and acts of worship and did not include exemptions from military service on the basis of conscience; Muñoz finds disagreement over what other activities were also considered beyond the jurisdiction of the state.⁹⁰

These accounts suggest that, in contrast with the right to property, religious freedom's role in preserving rights more generally was understood by prominent framers of the Constitution less in terms of diffusing power (and thereby promoting independence) and more in terms of limiting the scope of legitimate government authority. The recognition of duties to a higher authority implies necessary limits on the reach of the state and a rejection of "the notion that the political sphere is omniscient—that it has rightful authority over all of life."⁹¹ For Madison, as Noah Feldman has written, "the extension of civil government beyond its proper sphere threatened all liberties."⁹² This view of religious freedom as a primary basis for limited government was widely held at the time of the Founding. Historian Richard Hofstadter, in discussing how dissenting Protestantism in eighteenth century America contributed to political pluralism, notes:

That fear of arbitrary power which is so marked in American political expression had been shaped to a large degree by the experience men of dissenting sects had had with persecution. Freedom of religion became for them a central example of freedoms in general, and it was hardly

89. See *id.* at 373 ("[The framers] did not hold that all matters pertaining to religion are part of the natural right to religious liberty. [They] distinguished aspects of the natural rights of religious liberty from what we might call religious 'interests.'"); see also *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (discussing views of Madison and Jefferson before declaring that under the Free Exercise Clause "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order").

90. Muñoz, *supra* note 79, at 374. Other claims of religious freedom, which were not beyond the jurisdiction of the state, including conscientious objection to military service, might receive protection through political institutions. *Id.*

91. McConnell, *supra* note 16, at 1247.

92. Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 383 (2002). Justice Black echoed this sentiment when he wrote: "[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948).

accidental that the libertarian writers who meant so much to the colonials so often stemmed from the tradition of religious dissent.⁹³

By limiting the reach of congressional power specifically and civil government generally, religious freedom provides the foundation for a civil society independent from the state.⁹⁴

Along these same lines, contemporary scholars of religious liberty who embrace the concept of “the freedom of the church” or “church autonomy” emphasize a historical narrative in which the very concept of a limited state has its roots in the recognition of a separate sphere of authority for religious institutions.⁹⁵ These arguments often run in parallel with the view that the First Amendment’s religion clauses are not really about personal religious beliefs, but are instead about “the church.”⁹⁶ For example, Stephen Smith traces the commitment to freedom of conscience to what was initially “a campaign for freedom of the church—a campaign devoted to maintaining the church as a jurisdiction independent of the state.”⁹⁷ The Supreme Court’s decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.* invokes this

93. RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780–1840*, at 55 (1969).

94. See AKHIL REED AMAR, *THE BILL OF RIGHTS* 32 (1998) (ascribing a “federalism-based logic” to the First Amendment right of freedom of religion, which emphasizes its role in limiting Congressional power). Mary Ann Glendon and Raul Yanes, in discussing Amar’s work, assert that “[a] structural reading of the Bill of Rights reminds us that the Founders attached particular importance to the kinds of rights that help to create conditions for the exercise of other rights.” Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 543–44 (1991).

95. See, e.g., Thomas C. Berg et al., *Religious Freedom, Church-State Separation, & the Ministerial Exception*, 106 N.W.U. L. REV. COLLOQUY 175, 180 (2011) (“By setting the precedent for limited government, institutional religious freedom has promoted both political and religious liberty for all, believers and nonbelievers alike.”); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 16–17 (2000) (“[T]he idea of a jurisdictional separation between religious and temporal authority has roots which extend as far back as the Fifth Century, long before there was any real conception of individual conscience in matters of religion in papal teachings regarding the freedom of the church from the control of the Emperor.”).

96. Steven D. Smith, *Freedom of Religion or Freedom of the Church?, in* LEGAL RESPONSES TO RELIGIOUS PRACTICES IN THE UNITED STATES: ACCOMMODATION AND ITS LIMITS 250, 268 (Austin Sarat ed., 2012).

97. *Id.* at 250; c.f. Feldman, *supra* note 92, at 368–69 (discussing how John Locke “developed the argument for liberty of conscience by refining the idea of separate spheres of authority for religious and worldly affairs” expressed by prior thinkers).

historic battle, presenting it as the background against which the First Amendment was adopted.⁹⁸

C. Differences and Similarities

The discussion in the prior two Sections suggests an important distinction in the nature of claims that either the right to property or religious freedom serves to limit government authority and provides a foundation for rights more generally. Locke theorized that when individuals enter into society they receive, in exchange for their natural property rights, “a right to the goods *that are theirs according to the law of the community*.”⁹⁹ This formulation suggests that the regulation of property is, in contrast to religious freedom, necessarily within the scope of government authority. To the extent it recognizes property rights through positive law, a government willingly accepts limits on its power in relation to that property and commits to protecting it (and should the government act arbitrarily it will surrender its legitimacy).¹⁰⁰ In this way the right to property might be understood as an internal restriction on the scope of government authority, dependent, as Madison observed, on positive law. In contrast, religious freedom, as framed by the discussion in the prior Section, provides an external restriction, limiting the scope of government authority. This formulation is to some extent another way of expressing Rakove’s distinction between “procedural” rights and religious freedom.¹⁰¹

There is a case to be made, however, that this distinction is increasingly anachronistic. Consider again Jennifer Nedelsky’s treatment of the roles that religious liberty and property rights played in the design of the Constitution.¹⁰² Nedelsky suggests that two factors help explain the greater significance given to property. First, while religious freedom need not necessarily lead to deep divisions in a society, property will necessarily be distributed unequally,

98. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 182 (2012) (discussing the first clause of Magna Carta, which declares that “the English church shall be free, and shall have its rights undiminished and its liberties unimpaired”) (quoting J. HOLT, *MAGNA CARTA* App. IV, p. 317, cl. 1 (1965)).

99. LOCKE, *supra* note 45, at § 138 (emphasis added).

100. *Id.* at § 222.

101. See RAKOVE, *supra* note 40, at 312.

102. See NEDELSKY, *supra* note 3, at 210.

creating potential conflict.¹⁰³ As Madison wrote in Federalist Number 10, “the most common and durable source of factions has been the various and unequal distribution of property.”¹⁰⁴ Second, at the time of the Constitution’s drafting it was considered unlikely that the federal legislature would concern itself in any significant way with questions of religion, instead leaving such matters to the states.¹⁰⁵ While these factors may have shaped the debates and decisions of the Framers, they seem quaint today. Americans practice many more religions than at the time of the Constitution’s drafting, and a significant share practice no religion at all, suggesting an increased potential for deep division.¹⁰⁶ And the growth of the administrative state has led to frequent involvement of the federal government with matters of religion, particularly in recent years.¹⁰⁷ Accordingly, while rights to possess and use property—to the extent they dictate the distribution of scarce resources—might naturally seem more

103. See *id.* at 211.

104. THE FEDERALIST NO. 10 (James Madison).

105. See NEDELSKY, *supra* note 3, at 211 (“[I]t seemed possible for a government, the federal government in particular, simply to have nothing to do with religion.”); see also RAKOVE, *supra* note 40, at 314-15 (asserting that, for Madison, “[w]hile government could safely abstain from religious matters, it could never avoid regulating the ‘various and interfering interests’ of a modern society; and any legislative decision would necessarily affect the rights of one class of property holders or another”).

106. See Christopher C. Lund, *Religion is Special Enough*, 103 VA. L. REV. 481, 520 (2017) (discussing how significant increase, since Founding, in number and variety of religious denominations creates significantly more opportunities for conflict).

107. See Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 877 (2014) (“The United States is probably the most religiously diverse nation on the planet, and it is pervasively regulated by multiple layers and branches of government. Issues about the free exercise of religion arise whenever one of these diverse religious practices comes into conflict with one of these equally diverse laws or administrative practices.”); see also Philip Hamburger, *Exclusion and Equality: How Exclusion from the Political Process Renders Religious Liberty Unequal*, 90 NOTRE DAME L. REV. 1919, 1919-20 (2015) (asserting that “the growth of federal administrative power . . . leaves Americans, including religious Americans, no opportunity to vote for or against their administrative lawmakers[.]” excludes religious Americans from the political process, and “threatens religious equality”); Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 79, 82 (2009) (“The growth in scope of both religious activity and governmental power ensure that religious entities will be increasingly important, and that they will be in greater tension with various regulatory authorities.”).

rivalrous in nature,¹⁰⁸ the exercise of religious freedom is increasingly perceived as a potential source of conflict (and cost to others).¹⁰⁹

This potential for conflict creates challenges for traditional divisions between the private and public realms (and for any attempt to situate religious freedom in the former and property rights in the latter). To the extent that property rights are distinguished from other rights, such as speech and religion, on the basis that the latter sort of rights are “private freedoms that the state neutrally abides,”¹¹⁰ this distinction becomes less convincing if the categorization of religious freedom as a “private freedom” is rejected. As Muñoz observes, the “natural rights jurisdictional framework” embraced by Madison and Jefferson has over time given way to the “moral autonomy exemptionism” adopted by the Supreme Court in *Sherbert v. Verner* and subsequent cases.¹¹¹ These decisions, Muñoz argues, gradually subsumed claims related to freedom of worship into an exemption regime, as the Court “quietly eviscerated the framers’ categorical, jurisdictional protection for the nonbelief elements of the natural right of religious liberty.”¹¹² Unlike the jurisdictional account, this view does not deny the state the ability to restrict religious freedom, instead calling simply for a balancing of competing interests in determining whether an exemption should be conferred and in the process “transform[ing] the idea of limited government.”¹¹³ Muñoz’s compelling interpretation of the current state of free exercise rights raises questions for the claim that religious freedom, as it is currently

108. See WALDRON, *supra* note 1, at 31 (“Scarcity, as philosophers from Hume to Rawls have pointed out, is a presupposition of all sensible talk about property.”); see also Freyfogle, *supra* note 5, at 78-81 (“[P]roperty can enhance particular forms of liberty, but only at the expense of constraining other forms of liberty.”).

109. See, e.g., Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2516, 2554 (2014).

110. Underkuffler, *supra* note 20, at 313, 322 (“The classic liberal model of individual rights, in which the state must be ‘hands off’ and all can enjoy, might describe—and justify—the protection of speech, religion, or other such freedoms. It does not describe—or justify—the protection of property.”); see also NEDELSKY, *supra* note 3, at 153 (“In ways very different from, say, freedom of religion, property requires positive governmental action.”).

111. See Muñoz, *supra* note 79, at 369, 375-76.

112. *Id.* at 376 (citing *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993), which declared that only “a law targeting religious beliefs as such is never permissible”).

113. *Id.* at 379-80.

understood, is significantly distinguishable from property rights allocated by the state.

To the extent that either right is understood exclusively as the product of positive law, this suggests a broader set of critiques regarding the capacity for either right to independently provide a check on government power and a source of protection for other rights. Relatedly, and of particular importance for the discussion that follows, there are significant reasons to question whether the *individual* exercise of these (or any) rights, regardless of their source, is sufficient to restrain government action and strengthen other individual rights. A libertarian ideal of the isolated individual taking refuge from coercion by exiting society and taking shelter in private property rests upon what Eduardo Peñalver, discussing property specifically, has termed a “singularly implausible understanding of human nature and the dynamics of human communities.”¹¹⁴ To the extent that they depict social life as a subjective preference and individual choice, such claims ignore the undeniably social or communal character of both property and religious freedom (and religion itself for that matter).¹¹⁵ Similarly, with regards to religious freedom, Michael McConnell has emphasized the importance of the First Amendment’s choice of the words “free exercise of religion” rather than “rights of conscience.”¹¹⁶ McConnell argues that “‘conscience’ emphasizes individual judgment, while ‘religion’ also encompasses the corporate or institutional aspects of religious belief.”¹¹⁷ The term “religion” is often associated, in its origins, with

114. Peñalver, *supra* note 5, at 1972.

115. See *id.* at 1900, 1917-18 (describing property as “product of human cooperation,” which both presupposes and facilitates interdependency, cooperation, and shared responsibility); see also Rose, *supra* note 11, at 365 (contending that property is not simply a bulwark of individualism, but instead an “intensely social” institution that “mixes independence and cooperation”). In a similar vein, Jedediah Purdy, discussing Blackstone’s account of the primacy of property among social institutions, has argued that “[a] story in which property comes first really puts something else first: sociability, a human propensity to form attachments and cooperative relationships outside and preceding formal legal structures.” PURDY, *supra* note 5, at 4.

116. Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1489 (1990).

117. *Id.* at 1490. McConnell’s definition of conscience would seem to inadequately account for the role communities play in the formation of individual conscience. See, e.g., Robert K. Vischer, *How Necessary is the Right of Assembly?*, 89 WASH. U. L. REV. 1403, 1406 (2012) (discussing “relational dimension of conscience” and the role that “communities of discernment” play in its formation).

the Latin *religare*, which signifies a binding together, suggesting the communal nature of a significant share of religious exercise.¹¹⁸

The communal character of both property rights and religious freedom, which is discussed further in Part II, suggests that the foundational role attributed to these two rights is decidedly more plausible if we give adequate attention to the role certain normative communities, enabled by these rights, play as a bulwark for individual rights more generally. To the extent that an assertion of an individual property right (or any right) is dependent upon the state—through its courts, legislature, or police—for vindication, the capacity of isolated individuals exercising these rights to effectively limit intrusions by the state on rights more generally is inadequate.¹¹⁹ For even if we accept a view that government is “constrained by the independently established rights of the individuals subject to it,” there remains a need to consider, practically speaking, what is necessary to ensure that government does not overstep these bounds.¹²⁰ This includes, in the political realm, a need for collective action, harnessed and channeled by certain communal structures and institutions. Property rights and religious freedom, then, play a more indirect role as foundations by fostering such communities, which in turn provide buffers between the individual and the state and enable more effective self-governance and, when necessary, political dissent. I explore these themes further in the next Part.

II. PROPERTY AND RELIGIOUS FREEDOM AS CONSTITUTIVE RIGHTS

This Part places into conversation two sets of scholarship that emphasize communal aspects of property rights and religious

118. But see Sarah F. Hoyt, *The Etymology of Religion*, 32 J. AM. ORIENTAL SOC'Y 126, 126 (1912) (noting that while “[t]he connection of the word *religion* with *religare*, to bind, has usually been favored by modern writers,” there are reasons to doubt this association).

119. See NEDELSKY, *supra* note 3, at 50, 250 (asserting that the claim that property decentralizes power rests upon a myth as it “hides the role the state plays in allocating that power through its legal rules of property and contract and in supporting that power by punishing anyone who refuses to obey those rules”); see also ELY, *supra* note 6, at 122-23 (discussing how progressives in the early twentieth century rejected the Lockean view of property as a prepolitical right, framing property rights instead as a societal creation with a “contingent and changing nature”); Peñalver, *supra* note 5, at 1900 (“[A]ll but the most die-hard proponents of property as exit admit that property is a social institution that could not survive without the coercive power of some community, typically the state.”).

120. WALDRON, *supra* note 1, at 138 (comparing theories of Locke and Nozick on property rights as “historical entitlements”).

freedom respectively: the human flourishing account of property, developed most fully by Gregory Alexander and Eduardo Peñalver,¹²¹ and institutional accounts of religious liberty.¹²² These sets of scholarship, which have not previously been discussed together in the legal literature, share similar underlying premises, including the social nature of human beings and human dependence on communal structures for the exercise of individual rights. Together, I contend, these theoretical frameworks suggest that the right to property and religious freedom play distinct but at times complementary roles in relation to the formation and flourishing of normative communities. These communities can, in turn, bolster individual rights more generally. As such, they provide a foundation for other rights in the second and third manners discussed in Part I: by limiting state power and nurturing the conditions necessary for the exercise of rights more generally.

This Part begins by briefly introducing these two sets of scholarship, focusing on the similar normative premises upon which they rely. Building in part on this scholarship, I argue that property rights and religious freedom play distinct roles in the constitution of normative communities. I then examine the relationship between such communities and both individual identity formation and the development of important democratic virtues. Finally, I discuss how these communities also play an important role in challenging the state and vindicating individual rights.

A. Social Beings and Communal Contexts

In recent years scholars have developed more communal accounts of property rights and religious liberty. In both instances these rely in part upon the premise that human beings are inherently social and dependent upon social networks and communal institutions.¹²³ The Universal Declaration of Human Rights similarly

121. See *infra* notes 127-141 and accompanying text.

122. See *infra* notes 142-150 and accompanying text.

123. See, e.g., Alexander, *supra* note 24, at 760-61 (discussing reliance upon Aristotelian conception of human beings as social and political animals); Alexander & Peñalver, *supra* note 24, at 134 (proposing a “conception of community [that] rests upon a thick[] conception of the good human life . . . [and] builds on the Aristotelian notion that the human being is a social and political animal, not a self-sufficient one”); Garnett, *supra* note 22, at 274 (“The freedom of religion is not only lived and experienced through institutions, it is also protected and nourished by them.”); Peñalver, *supra* note 5, 1911-19 (discussing arguments for the “profoundly

emphasizes the importance of community, “in which alone the free and full development of [human] personality is possible.”¹²⁴ The fact that humans are inherently social is widely accepted in the scientific literature.¹²⁵ Nonetheless, prevalent arguments for the foundational status of these two rights emphasize their individual exercise, championing the lone voice of conscience or the solitary individual exiting society and avoiding coercion by retreating to her private property.¹²⁶

Analyzing these two sets of scholarship together reveals intriguing overlaps in their accounts of both the role each right plays in the formation of normative communities and the part those communities in turn play in supporting the exercise of individual rights. Building on this scholarship, I argue that the exercise of property rights and religious freedom by and within communities provides a more plausible foundation and bulwark for individual rights more generally.

In the property context, Gregory Alexander and Eduardo Peñalver have developed a theory of property rights grounded in a commitment to a particular notion of human flourishing.¹²⁷ Their account relies upon an “Aristotelian” or “ontological” conception of community and of human beings as naturally social and political,

social nature of human beings” and the role of property “in facilitating healthy social life”).

124. Universal Declaration of Human Rights, Gen. Assemb., 3d Sess., U.N. Doc. A/810 (1948).

125. See, e.g., Simon N. Young, *The Neurobiology of Human Social Behaviour: An Important but Neglected Topic*, 33 J. PSYCHIATRY & NEUROSCIENCE 391, 391-92 (2008) (“Humans are inherently social. . . . Group behaviour is an important component of human social behaviour and may differ in some ways from dyadic interactions.”). “The utilitarian and individualistic view of biology that was characteristic of the 1970s is giving way to a more prosocial picture of evolution: arguments for altruism and cooperation are today made in agreement with the mechanisms of natural selection and no longer against it.” Maurizio Meloni, *How Biology Became Social, and What It Means for Social Theory*, 62 SOC. REV. 593, 595 (2014) (citations omitted).

126. See *supra* notes 62-70 and accompanying text.

127. See Alexander & Peñalver, *Properties of Community*, *supra* note 24, at 135 (“The Aristotelian conception of human beings as social and political animals operates for us as part of a substantive understanding of what it means to live a distinctively human life and to flourish in a characteristically human way.”). See generally Gregory S. Alexander & Eduardo M. Peñalver, *Introduction*, in PROPERTY AND COMMUNITY (Gregory S. Alexander & Eduardo M. Peñalver eds., 2010); Gregory S. Alexander, *Pluralism and Property*, 80 FORDHAM L. REV. 1017, 1045-47 (2011); Alexander, *supra* note 24, at 745.

rather than self-sufficient and independent.¹²⁸ Individuals depend upon “a particular web of social relationships . . . to develop the distinctively human capacities that allow us to flourish.”¹²⁹ Most important among these is the “capacity to discern among multiple available life horizons.”¹³⁰ Freedom and autonomy, which would seem particularly solitary interests, are, Alexander and Peñalver argue, only meaningful “within a vital matrix of social structures and practices” and depend upon, among other things, an “institutional context”¹³¹ and “communal infrastructure.”¹³² This dependence engenders “an obligation to participate in and support the social networks and structures that enable us to develop those human capabilities that make human flourishing possible.”¹³³ These capabilities include “capacities to engage in practical reasoning, to participate in the social life of the community, and to make decisions about how to live our lives.”¹³⁴ Amartya Sen, upon whose

128. Alexander, *supra* note 24, at 760 (“The ontological conception stresses the fact that although human beings value and strive for autonomy, dependency and interdependency are inherent aspects of the human condition.”). See ALEXANDER & PEÑALVER, *supra* note 68, at 80-101 (2012) (outlining theory rooted in the work of Aristotle and Thomas Aquinas).

129. Alexander, *supra* note 24, at 761.

130. See *id.* at 762.

131. ALEXANDER & PEÑALVER, *supra* note 68, at 90; see also Gregory S. Alexander, *Five Easy Pieces: Recurrent Themes in American Property Law*, 38 U. HAW. L. REV. 1, 9 (2016) (“Individual autonomy can be acquired only within a vital matrix of social structures and practices. Its continued existence and exercise depends upon a richly social, cultural, and institutional context, and the free and autonomous individual must rely upon others to provide this context.”). See *id.* at 8-9 (arguing that developing autonomy, one end of private property, depends in part upon relationships with others).

132. ALEXANDER & PEÑALVER, *supra* note 68, at 87. Although they suggest that this communal infrastructure might exist at the societal level, rather than the level of particular groups, Alexander and Peñalver contend that “living within a particular sort of society, a web of particular kinds of social relationships, is a necessary condition for humans to be able to develop the distinctively human capacities that allow us to flourish.” See *id.* at 87-88.

133. Alexander & Peñalver, *supra* note 24, at 139, 143 (arguing that individuals depend upon communities “not only for our physical survival but also for our ability to function as free and rational agents”). Alexander and Peñalver build upon Aquinas’s thought, particularly his emphasis on the duty to love one’s neighbor as oneself, which “requires us to support the social and material preconditions for their (and our own) flourishing.” ALEXANDER & PEÑALVER, *supra* note 68, at 85.

134. Alexander & Peñalver, *supra* note 24, at 135, 142 (arguing that “authentic, robust freedom” must include “the capacity to make meaningful choices among alternative life horizons”).

capabilities approach Alexander and Peñalver rely, defines a capability as “a kind of freedom: the substantive freedom to achieve alternative functioning combinations (or, less formally put, the freedom to achieve various lifestyles).”¹³⁵ Martha Nussbaum, who, with Sen, pioneered the capabilities approach, has acknowledged her own use of “the language of rights, or the related language of liberty and freedom, in fleshing out the account of the basic capabilities.”¹³⁶ This suggests that capabilities, at least in part, might be framed as rights, or that we might infer a right to the resources necessary to develop certain capabilities.¹³⁷

As such, Alexander and Peñalver’s theoretical framework can be interpreted in a way that suggests that property rights play a foundational role for other rights, but that this role is mediated by particular social structures and by the fulfillment of duties inherent in those rights. Put another way, communal structures exist in a mutually reinforcing relationship with individual rights. Communal structures both enable the development of conditions necessary for the exercise of individual rights and depend upon the recognition of individual rights.¹³⁸ Private property, in turn, facilitates social

135. AMARTYA SEN, DEVELOPMENT AS FREEDOM 75 (1999). See Amartya Sen, *Capability and Well-Being*, in THE PHILOSOPHY OF ECONOMICS: AN ANTHOLOGY 270, 273 (Daniel M. Hausman ed., 3d ed. 2008) (“[H]uman capabilities constitute an important part of individual freedom.”).

136. Martha C. Nussbaum, *Capabilities and Human Rights*, 66 FORDHAM L. REV. 273, 277 (1997) (“[R]ights play an increasingly large role inside the account of what the most important capabilities are.”).

137. Sen himself rejects an attempt to subsume capabilities entirely within human rights (or vice versa). Amartya Sen, *Human Rights and Capabilities*, 6 J. HUM. DEV. 151, 163 (2005). But he acknowledges that human rights can be framed “as rights to certain specific freedoms” and that “capabilities can be seen, broadly, as freedoms of particular kinds.” *Id.* at 152. This suggests a basic connection between the two concepts. However, Sen further emphasizes the need to distinguish between two aspects of freedom, “opportunity” and “process,” and contends that “[w]hile the opportunity aspect of freedoms would seem to belong to the same kind of territory as capabilities, it is not at all clear that the same can be said about the process aspect of freedom.” *Id.*

138. Alexander & Peñalver, *supra* note 24, at 147 (“[S]ome exclusive control over resources is necessary in order to facilitate the capability of sociality.”). As Jeremy Waldron observes, even if one accepts that “social life and social responsibility are the most important part of what it is to be human,” a theorist of rights can still maintain that individual interests must be protected so that individuals are capable of fulfilling their social responsibilities and participating in a community. WALDRON, *supra* note 1, at 104.

interactions, and land and other resources play a role in the constitution of social groups.¹³⁹

The “comprehensive approach” to property proposed by Laura Underkuffler, another prominent voice in the progressive property movement, similarly emphasizes the vital importance of a social and collective context for the development of individual autonomy.¹⁴⁰ This collective context provides a source of both “support and restraint” for a “broad range of human liberties” included within the concept of property.¹⁴¹

With regards to religious liberty, in recent years a group of scholars has similarly emphasized the need for careful reflection on the distinct institutions through which individuals exercise First Amendment rights broadly speaking, the concomitant need to provide legal protections for these institutions, and the important role these institutions play in fostering and creating opportunities for the exercise of specific rights.¹⁴² At times these scholars highlight a structural role that certain communities and institutions play in mediating between the individual and the government and in serving as a vehicle for democratic deliberation and participation.¹⁴³ Like Alexander and Peñalver, Paul Horwitz, a prominent proponent of this approach to First Amendment law, stresses the “fundamental

139. See Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1, 11 (1989).

140. Underkuffler, *supra* note 20, at 147 (“By viewing a collective context as necessary for the definition and exercise of individual rights, the comprehensive approach to property forces us to rethink the relationship between the community and individual rights. It is a step toward rapprochement of ideas of individual liberty, individual autonomy, and collective life.”). Underkuffler’s “comprehensive approach,” which links “the broad range of human rights contained within the concept of property to the development of human personality . . . not only assumes a collective role in the definition or limitation of individual property rights, but also assumes a collective context for their exercise and realization.” *Id.* at 140.

141. *Id.* at 141.

142. See Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 91-92 (1998). See generally HORWITZ, *supra* note 22, at 264; Richard W. Garnett, *The Freedom of the Church: (Toward) an Exposition, Translation, and Defense*, in THE RISE OF CORPORATE RELIGIOUS LIBERTY 39, 45 (Micah Schwartzman et al. eds., 2016).

143. See, e.g., HORWITZ, *supra* note 22, at 84 (discussing “infrastructural nature of First Amendment institutions”); Richard W. Garnett, *Religious Liberty, Church Autonomy, and the Structure of Freedom*, in CHRISTIANITY AND HUMAN RIGHTS: AN INTRODUCTION 267, 269 (John Witte, Jr. & Frank S. Alexander eds., 2010) (describing “right to church autonomy” as “a means—a structural mechanism—for protecting both the freedom of religion and human rights more generally”).

reality—that life is social and institutional” and argues in support of “mak[ing] that reality a more important and more easily recognized part of First Amendment law.”¹⁴⁴ Horwitz defines First Amendment institutions as “those institutions that are foundational to our lives as social beings, as citizens and participants in our collective culture.”¹⁴⁵ These institutions both equip individuals for social life and give that life meaning.¹⁴⁶ More generally, this scholarship is animated by an intuition that certain rights, particularly rights of expression, are dependent upon “the existence and flourishing of, certain institutions.”¹⁴⁷ In the religious freedom context the concept is variably referred to as the “freedom of the church”¹⁴⁸ and “institutional free exercise,”¹⁴⁹ among other terms.

The Supreme Court unanimously embraced a version of institutional free exercise rights in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.¹⁵⁰ That decision, to which I return in Section II.D, rejected the position that religious institutions could only invoke a right to freedom of association akin to that of secular groups, declaring that “the text of the First Amendment . . . gives special solicitude to the rights of religious organizations.”¹⁵¹ It is worth noting that the Court’s decision relied in part upon a series of earlier decisions resolving intra-church disputes over property.¹⁵² However, although those earlier cases involved disputes over control of church property, they turned on the church’s

144. HORWITZ, *supra* note 22, at 84.

145. *Id.*

146. *Id.*

147. Garnett, *supra* note 22, at 274.

148. See, e.g., Smith, *supra* note 96, at 268. See generally Garnett, *supra* note 22; Paul Horwitz, *Freedom of the Church Without Romance*, 21 J. CONTEMP. LEGAL ISSUES 59, 61 (2013).

149. See, e.g., Lloyd Hitoshi Mayer, *Politics at the Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise*, 89 B.U. L. REV. 1137, 1207 (2009).

150. 565 U.S. 171 (2012). In *Hosanna-Tabor* the Court recognized “a ‘ministerial exception,’ grounded in the First Amendment, which precludes application of [employment discrimination] legislation to claims concerning the employment relationship between a religious institution and its ministers.” *Id.* at 188.

151. *Id.* at 173.

152. See *id.* at 185-87 (discussing church property cases); see also Carl H. Esbeck, *A Religious Organization’s Autonomy in Matters of Self-Governance: Hosanna-Tabor and the First Amendment*, 13 ENGAGE 168, 193 (2012) (“In *Hosanna-Tabor*, a unanimous Supreme Court took a discrete line of cases involving religious disputes and church property and enlarged on it so as to give rise to a full-throated protection of religious institutional autonomy.”).

freedom to select its own leaders, an internal decision crucial to communal identity.¹⁵³

My analysis in the remainder of Part II and most of Part III will focus on communities at the nexus of property rights and religious liberty. That is, it will emphasize the role of property rights in the lives of religious communities and the synergies between property rights and religious liberty in the set of examples discussed in Section III.A. Although I emphasize the interaction of property rights and religious liberty in the context of communities, I will at times throughout the remainder of the Article suggest related insights regarding the property rights of non-religious communities and the interaction of property rights and religious liberty for individuals, topics I hope to explore further in future work.

B. Normative Communities and Individual Identity

In his essay *Nomos and Narrative*, Robert Cover emphasized the role that property law and the Free Exercise Clause (as well as the freedom of contract and corporation law) play in creating boundaries that enable insular communities to develop distinct ideologies and to constitute “an integrated world of obligation and reality from which the rest of the world is perceived.”¹⁵⁴ Cover discussed, among other examples, the experience of Anabaptist communities, as described in the briefs filed before the Supreme Court in *Wisconsin v. Yoder*.¹⁵⁵ As he observed, the Amish and Mennonites framed their communities and religious commitments in both spiritual and spatial terms: “The image is one of a dedicated, sacred space, a refuge carved out from the general secular, legal space of the state.”¹⁵⁶

Anabaptist communities might be deemed outliers, firmly committed to a rejection of (and partial physical isolation from) many elements of the secular world readily embraced by most

153. See, e.g., *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 116 (1952) (declaring that a religious organization’s freedom to select its clergy has “federal constitutional protection as a part of the free exercise of religion against state interference”).

154. See Cover, *supra* note 21, at 30-31.

155. 406 U.S. 205 (1972). See Cover, *supra* note 21, at 29 (“There exists no Amish religion apart from the concept of the Amish community. A person cannot take up the Amish religion and practice it individually.”).

156. Cover, *supra* note 21, at 30.

religious individuals.¹⁵⁷ Yet the vision of religious communities as sources of distinct normative commitments possesses broader relevance. As Justice Brennan would later declare, drawing on Cover's article, "For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals."¹⁵⁸ More recently, Justice Alito remarked that "[t]hroughout our Nation's history, religious bodies have been the preeminent example of private associations that have 'act[ed]' as critical buffers between the individual and the power of the State."¹⁵⁹

These passages suggest a set of related insights. First, free exercise and the right to property play significant roles in enabling the formation of normative communities.¹⁶⁰ Second, these communities can support the formation of individual identity and the exercise of individual rights.¹⁶¹ Justice Brennan made this last point explicitly when he stated: "Furtherance of the autonomy of religious organizations often furthers individual religious freedom as well."¹⁶² Third, religious communities are an example of private associations that—as "critical buffers between the individual and the power of the

157. See *Yoder*, 406 U.S. at 210 ("Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence.").

158. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring) (citing Karl Barth, *The Christian Community and the Civil Community*, in *COMMUNITY, STATE AND CHURCH* 149 (1960)). See Cover, *supra* note 21, at 8-14; Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1389 (1981) ("Religion includes important communal elements for most believers. They exercise their religion through religious organizations, and these organizations must be protected by the [Free Exercise] clause.").

159. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 199 (2012) (Alito, J., concurring) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984)).

160. See Laycock, *supra* note 107 (discussing how the Free Exercise Clause helps establish normative communities); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 994 (1982) (discussing how property rights help lead to normative communities).

161. See Witte, *supra* note 13, at 718-19 (arguing that the state alone cannot protect rights and that instead "mediating structures," including religious institutions, "play a vital role in the cultivation and realization of rights").

162. *Amos*, 483 U.S. at 342 (Brennan, J., concurring).

[s]tate”¹⁶³—are more likely to limit that power than isolated individuals exercising their rights.

While religious freedom plays a particularly important role for a subset of private associations, the freedom to associate more generally is, as the Supreme Court has remarked, “largely dependent on the right to own or use property.”¹⁶⁴ A rich literature examines the relationship between property and personal identity. The strongest statement of this relationship is Margaret Radin’s personhood theory of property.¹⁶⁵ Radin draws upon a Hegelian notion of property to argue for an understanding of property entitlements grounded in the concept of personhood.¹⁶⁶ This perspective, Radin contends, suggests a need to place property rights along a continuum “from fungible to personal,” depending upon their relationship to personhood, with entitlements “closely connected [to] personhood” entitled to stronger protection.¹⁶⁷ In an analogous manner, property can play a crucial role in institutional and community identity formation, with particular pieces of property playing distinctly important roles in the life of a community.¹⁶⁸

But how does the communal or institutional exercise of both these rights further not only communal and individual identity, but also the exercise of other individual rights? I would suggest that it is by supporting the formation and flourishing of civil society groups

163. *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring).

164. *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974) (upholding injunction that prohibited city granting segregated private schools exclusive access to public recreational facilities).

165. See Radin, *supra* note 160, at 994; see also C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PENN. L. REV. 741, 747 (1986) (“The personhood function of property is to protect people’s control of the unique objects and the specific spaces that are intertwined with their present and developing individual personality or group identity.”).

166. See Radin, *supra* note 160, at 992-96.

167. *Id.* at 986 (“[R]ights near one end of the continuum—fungible property rights—can be overridden in some cases in which those near the other—personal property rights—cannot be. This is to argue not that fungible property rights are unrelated to personhood, but simply that distinctions are sometimes warranted depending upon the character or strength of the connection.”). See Underkuffler, *supra* note 20, at 27 (suggesting that protection afforded to a particular right may depend in part upon whether the object of the right is fungible).

168. See Radin, *supra* note 160, at 977-78 (discussing Hegelian personality theory and noting potential political implications for group claims to certain resources, including property); see also Alexander & Peñalver, *supra* note 24, at 128 (“The nexus between theories of property and community is perhaps tightest in Hegelian property theory, where property practically stands in the place of the individual herself.”).

distinct from, and at times at odds with, the state. These groups carve out the space—both literally and figuratively—within which important social norms and virtues are fostered and individual identities are shaped.¹⁶⁹ They also provide a more secure base for challenging the state on the basis of those distinct normative commitments.¹⁷⁰

A diverse range of social interactions can give rise to communities that foster these norms and virtues, which in turn can support the broader recognition and protection of individual rights.¹⁷¹ These communities do so in two seemingly contradictory ways: by instilling certain democratic virtues, including respect for the rights and interests of others,¹⁷² and, at times, by strengthening efforts to challenge public norms in the name of vindicating individual rights, which I discuss in more detail in the next Section.¹⁷³

At one extreme, commercial interactions, facilitated by personal property rights, can serve as “a moderating, socializing phenomenon,” a point emphasized by Montesquieu, Hume, and others.¹⁷⁴ For Hume these commercial interactions give rise to a “natural progress of human sentiments,” including a greater regard for justice and a recognition of that virtue’s utility for mutually advantageous interactions.¹⁷⁵ As Carol Rose has noted, Scottish Enlightenment thinkers sought to transform the sin of avarice into a virtuous and civilizing concern for the social interest through commercial transactions, as “commerce requires one to focus not on

169. The role I propose here is akin to one that John Inazu ascribes to the right of assembly in *Liberty’s Refuge*, his illuminating analysis of that right. INAZU, *supra* note 39, at 5. According to Inazu, the right of assembly “provides a buffer between the individual and the state that facilitates a check against centralized power. It acknowledges the importance of groups to the shaping and forming of identity.” *Id.*

170. See generally *infra* Subsection III.A.3 (discussing churches in the sanctuary movement).

171. See INAZU, *supra* note 39, at 3–4.

172. See Alexander & Peñalver, *supra* note 24, at 140 (asserting that communities serve a vital role in shaping the “social norms” necessary for a society marked by “equality, dignity, respect, and justice as well as freedom and autonomy”).

173. See *infra* note 182 and accompanying text.

174. See ALEXANDER, *supra* note 4, at 62 (discussing Montesquieu and Hume).

175. DAVID HUME, AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS 21–25 (1777). See JENNIFER A. HERDT, PUTTING ON VIRTUE: THE LEGACY OF THE SPLENDID VICES 310 (2008) (discussing how, for Hume, “virtues required for life in society,” including justice, “evol[ue] gradually in the course of social interaction”).

others' slights to one's own honor, but rather on satisfying the others' wants and interests."¹⁷⁶

By enabling participation in commerce and engagement in the market with people of diverse backgrounds, property rights can render individuals more tolerant and prone to respect rights generally.¹⁷⁷ This is, of course, a rather attenuated conception of both virtue and community, driven in significant part by self-interest.¹⁷⁸ For virtuous action requires not just the performance of specific outward acts, but also a particular inner disposition and a proper reason for action.¹⁷⁹ Nonetheless, this account suggests one mechanism through which social interactions facilitated by property rights can enable—whether truly virtuous or not—sentiments inclined towards a respect for the interests and rights of others. Engagement in commerce can also help foster traits of industry and initiative long deemed necessary for self-government.¹⁸⁰

The contention that property regimes can give rise to virtuous conduct and the traits necessary for self-governance has parallels in

176. Rose, *supra* note 11, at 352.

177. See *id.* at 353-54 (discussing Tocqueville's account of commerce as a "civilizing institution" in mid-nineteenth century America).

178. For an excellent treatment of this and other tensions in historical accounts of virtue and the process of its acquisition, see generally HERDT, *supra* note 175, at 306-08. For a discussion of how land use decision making can foster virtues including industry, justice, and humility, see Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 876-86 (2009).

179. See Peñalver, *supra* note 178, at 864-65.

180. See ALEXANDER, *supra* note 4, at 62 (noting that, for Scottish social theorists of the eighteenth-century, commerce "promoted the common welfare by stimulating the individual initiative and industry that was understood as indispensable to the moral personality that itself was indispensable to the maintenance of a virtuous republic"); PURDY, *supra* note 5, at 112-13 (analyzing responsibility as constitutive of freedom and connected to property through freedom); WALDRON, *supra* note 1, at 310-12 (discussing the claim that recognition of private property rights, which grant an individual control over a particular resource, can encourage responsible management of those resources); Alexander, *supra* note 73, at 1269-70 (discussing the argument that "a regime of private ownership inculcates in individuals a sense of personal responsibility because they realize that they must effectively manage their own property if they are to satisfy their own needs"); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 355 (1967) (discussing how private ownership encourages careful stewardship); Rose, *supra* note 11, at 364 (discussing how property functions as "an educative institution" that "reward[s] the character traits needed not only for commerce but also for self-government"). Alexander notes that for Hume and other Scottish writers, a dynamic and fluid commercial society helped avoid the recreation of feudal hierarchies, thereby promoting individual autonomy. ALEXANDER, *supra* note 4, at 62.

the context of free exercise rights and the role of religious communities. During the Founding period, religious communities were seen as a primary source of the virtues and norms necessary for democratic governance.¹⁸¹ Writing a little less than a century later, Alexis de Tocqueville declared that although “[r]eligion in America takes no direct part in the government of society . . . it must nevertheless be regarded as the foremost of the political institutions of that country; for if it does not impart a taste for freedom, it facilitates the use of free institutions.”¹⁸² Normative communities can bolster protections for individual rights not only by instilling important democratic virtues that support a general commitment to rights. At important points in history, such communities have also sought to vindicate individual rights by acting, on the basis of deep-seated normative commitments, in opposition to the state.¹⁸³ Such dissent can play an important role in protecting individual rights, as the next Section discusses.

C. Normative Communities and Challenges to the State

As the American Jesuit John Courtney Murray argued, discussing churches in particular, normative communities can play an important role in limiting the reach of government and “mobilizing the moral consensus of the people and bringing it to bear upon the power.”¹⁸⁴ By aggregating the efforts of a multitude of

181. See Thomas C. Berg, *The New Attacks on Religious Freedom Legislation, and Why They Are Wrong*, 21 CARDOZO L. REV. 415, 430 (1999) (“The Framers believed . . . that respecting [the communal norms of religious groups] played a crucial role in fostering virtue among the citizenry.”); Timothy L. Hall, *Religion and Civic Virtue: A Justification of Free Exercise*, 67 TUL. L. REV. 87, 106-07 (1992) (“Eighteenth-century Americans generally agreed that religion was a principal social actor in the formation of civic virtue.”).

182. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 334 (Henry Reeve trans., 7th ed. 1847); see also AMAR, *supra* note 94, at 45 (“[T]he free-exercise clause protected not simply the ‘private’ worship of an individual, but also the nongovernmental yet ‘public’ (Tocqueville’s word) education of citizens—the very foundation of democracy.”); Horwitz, *supra* note 107, at 103 (discussing Tocqueville’s linking of “‘religious associations’ influence in forming the moral character and political development of the nation with a vibrant conception of civil freedom and church-state separation”).

183. See *infra* Section II.C.

184. JOHN COURTNEY MURRAY, *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION* 204-05 (1960) (declaring that “the Church stood . . . between the body politic and the public power, not only limiting the reach of the power over the people, but also mobilizing the moral consensus of

individuals and targeting those efforts toward a collective goal, communal institutions provide a more robust counterpoint to the state than do isolated individual actors, particularly in the political sphere.

Both property rights and religious freedom play important historical roles in the context of certain claims involving privacy and the rights of assembly and association for such dissenting groups. The relationship between these rights is reflected in the development of the Fourth Amendment's prohibition of searches and seizures, which grants special mention to protections for "papers."¹⁸⁵ As Akhil Amar has written, this can be traced to *Entick v. Carrington* and its emphasis on special protections for searches of papers, which "indirectly protected values of free religious and political expression."¹⁸⁶ Explicit restrictions on searches of personal property served to check government power over the speech and expressive activity of those in opposition.¹⁸⁷ These restrictions sought to limit the government's capacity to suppress political dissension, which often originated in religious communities.¹⁸⁸ Scholars have drawn a number of other historical links between the activities of religious dissenters and the recognition of a range of rights beyond religious freedom.¹⁸⁹ These include the right of assembly,¹⁹⁰ freedom of the press,¹⁹¹ and others.¹⁹²

the people and bringing it to bear upon the power."); *c.f.* ALEXANDER, *supra* note 4, at 29 (arguing that rather than emphasize the "protection of individual freedoms against collective encroachment," republican lawyers during the Founding period prioritized collective liberty "against aristocratic privileges and power").

185. AMAR, *supra* note 94, at 75.

186. *Id.* at 76.

187. *See* *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978) ("Where the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude.'") (quoting *Stanford v. Texas*, 379 U.S. 476, 485 (1965)).

188. *See* AMAR, *supra* note 94, at 76.

189. Louis Henkin contends that religious dissenters, who asserted both individual and church rights against established churches and political authority, played a crucial role in the development of the idea of rights generally. *See* LOUIS HENKIN, *THE AGE OF RIGHTS* 185 (1990). Henkin sketches a narrative in which "religion began to see man's needs—his religious needs, and then other needs—as matters of right, of entitlement under higher law." *Id.*

190. *See* INAZU, *supra* note 39, at 24-25 (discussing how trial of William Penn and other Quakers—"on the charge that their public worship constituted an unlawful assembly"—was invoked in the First Congress in support of including the right of assembly in the Bill of Rights); *see also* AMAR, *supra* note 94, at 245 (discussing how during antebellum era "the core right of assembly at issue [for abolitionists] seems to be the right of blacks 'to assemble peaceably on the Sabbath

Along similar lines, Samuel Moyn attributes the embrace of human rights discourse by many Christians in the aftermath of World War II, in part, to a belief that it was vital to secure an independent space, free from the state, in which religious communities could offer distinct visions of ethical life and cultivate moral action.¹⁹³ Although motivated in part by self-interest, this desire to protect civil society generally and the exercise of religious freedom specifically in and through particular communities led to efforts in support of a broader set of human rights.¹⁹⁴ This implies that the maintenance of

for the worship of [the] Creator.”); John H. Yoder, *Response of an Amateur Historian and a Religious Citizen*, 7 J.L. & RELIGION 415, 416-17 (1989) (“There was a long British Puritan history, from the age of Milton to the 1689 Bill of Rights, in the course of which the civil freedoms of speech, press, and assembly arose out of religious agitation, not the other way round.”).

191. See McConnell, *supra* note 95, at 16 (discussing the connection between early struggles to publish religious tracts and freedom of the press).

192. See AMAR, *supra* note 94, at 82-83 (discussing the relationship between the freedom of religion—and its role in protecting opposition to government ideology or religion—and the origins of the Fifth Amendment right against self-incrimination as well as the Eight Amendment’s prohibition on “cruel and unusual punishments”). The 1780 Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts follows its recognition of a right to worship with the declaration that “no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, *for worshipping God in the manner and season most agreeable to the dictates of his own conscience*.” MASS. CONST. of 1780, pt. 1, art. II (emphasis added). The Supreme Court, in *Davis v. Beason*, 133 U.S. 333, 342 (1890), observed that the First Amendment’s religion clauses were adopted due to factors including “the cruelties and punishments inflicted, by the governments of Europe for many ages, to compel parties to conform, in their religious beliefs and modes of worship, to the views of the most numerous sect.” *Id.*

193. SAMUEL MOYN, *CHRISTIAN HUMAN RIGHTS* 11 (2015) (“‘Human rights’ came to figure because, in the crucible of reaction before and during World War II when they flirted with authoritarian states (or built their own), Christians learned that the cultivation of moral constraint depended on keeping the spiritual communities that offered their vision of ethical life a home partly free from the state.”).

194. *Id.* at 10-11. According to Moyn, in the aftermath of World War II, international human rights were increasingly appealing for religiously oriented conservatives fearful of totalitarian states “snuff[ing] out their civil society” as “rights could appear a formidable antidote to a new syndrome of state hypertrophy inimical to religious values.” *Id.* As Moyn notes in a different work, the Commission to Study the Bases of a Just and Durable Peace’s *Six Pillars of Peace*, issued in 1942, included a call for an international bill of rights that would give priority to freedom of religion. SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* 53 (2010). Anna Su has argued that Roosevelt’s inclusion of religious freedom among his “four freedoms” reflects a similar vision of religious freedom as a “core component of a democratic order” and an “ideological weapon in the war against

such communities was deemed necessary to foster and transfer the ethical norms that would inform individual and communal efforts on behalf of such rights.¹⁹⁵ It also suggests the driving force was a communal yet particularistic interest rather than a broadly egalitarian commitment to individual rights.¹⁹⁶ At a minimum this could yield, based on self-interest, support for a broad set of individual rights. More hopefully, the substance of a particular community's ethical norms and beliefs may include a deeply held and broadly inclusive respect for individual rights, which will strengthen the commitment to such rights in the larger society.

The role these rights play in carving out space for the exercise of other rights is not simply historical. Rights of property and religious liberty, by supporting the development and continued existence of a multitude of normative communities, contribute to a more vibrant and pluralist civil society.¹⁹⁷ By dispersing power more

totalitarian Nazi Germany.” ANNA SU, EXPORTING FREEDOM: RELIGIOUS LIBERTY AND AMERICAN POWER 62 (2016).

195. See MOYN, *supra* note 194, at 10-11.

196. There are reasons to challenge this interpretation and to suggest, at the very least, that the embrace of rights was not purely the product of self-interest, but instead reflected a decision to embrace a new language consistent with historical antecedents. To give one example, while the Catholic Church explicitly embraced human rights in Pope John XXIII's 1963 encyclical, *Pacem in Terris*, related concepts can be found in much earlier church documents and theological writings. Pope John XXIII, *Pacem in Terris*, ENCYCLICAL LETTER ¶ 9 (1963) (recognizing “rights and duties [that] are universal and inviolable, and therefore altogether inalienable”). For example, Pope Paul III's 1537 papal bull *Sublimus Dei* argued against the enslavement of indigenous people in the Americas and the confiscation of their property. Although it did not discuss a concept of rights per se, it asserted that indigenous people possess an equal human dignity grounded in their “capacity to attain to the inaccessible and invisible Supreme Good and behold it face to face.” Pope Paul III, *Sublimus Dei*, PAPAL BULL (1537), <http://www.papalencyclicals.net/Paul03/p3subli.htm> [<https://perma.cc/8NYU-5ZB7>]. Brian Tierney's work traces the idea of natural rights back still further to twelfth century writings. See BRIAN TIERNEY, THE IDEA OF NATURAL RIGHTS: STUDIES OF NATURAL RIGHTS, NATURAL LAW AND CHURCH LAW, 1150-1625, at 43 (1997) (tracing the evolution of the understanding of the phrase *ius naturale* from a concept of objective justice to a subjective natural right).

197. See *Walz v. Tax Comm'n*, 397 U.S. 664, 689 (1970) (Brennan, J., concurring) (“[G]overnment grants [property tax] exemptions to religious organizations because they uniquely contribute to the pluralism of American society by their religious activities. Government may properly include religious institutions among the variety of private, nonprofit groups that receive tax exemptions, for each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society.”); see also Peñalver, *supra* note 5, at 1962 (suggesting a theoretical shift from an emphasis on individuals shielded by an

broadly, such a society better shields dissenting voices from majoritarian whims.¹⁹⁸ Normative communities, through the thick social relationships they build among their members, are more effective vehicles for the dispersal of power than isolated individual rights holders. As Madison famously outlined in Federalist No. 10, since the “latent causes of faction are . . . sown in the nature of man,” the means of relief is to address its effects, rather than its causes.¹⁹⁹ Madison emphasized enlarging the scope of government to include multiple factions, such that no single faction dominates.²⁰⁰ A corollary of this approach would be to strengthen protections for and encourage development of a broader array of normative communities. In Part III, I suggest a few ways in which legal doctrine might do so.

D. The Risk of Exclusion and Discrimination

An emphasis on the role that such communities play in support of individual rights prompts a few obvious critiques. First, one might argue that this provides little comfort to individuals who are not members of such a community. However, my intention is not to argue that the conception of community I discuss in this Part is the only vehicle for protecting individual rights more generally. Instead my point is that, to the extent one believes that the right to property and religious liberty play distinct roles in the recognition and protection of individual rights more generally, this claim is decidedly more plausible if we emphasize the communal exercise of these rights. These communities can also strengthen the individual rights of non-members, through the process of instilling democratic norms,

impermeable boundary of property rights towards a focus on “preserving the ability of communities to employ property as a tool for creating diverse patterns of life”).

198. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (“According to protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.”); John Witte Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 397 (1996) (arguing that for Eighteenth-Century Puritan and civic republican writers, a diverse set of institutions “provided multiple forums for religious expressions and actions, important bulwarks against state encroachment on natural liberties, particularly religious liberties, and vital sources of theology, morality, charity, and discipline in the state and broader community”).

199. THE FEDERALIST NO. 10 (James Madison).

200. See *id.*

through challenging and at times limiting the power of the state, and through furthering a commitment to pluralism generally.

This leads to a second criticism, which is that an emphasis on such communities raises concerns regarding exclusion and discrimination.²⁰¹ Consider again, in this respect, the Court's decision in *Hosanna-Tabor*, which emphasized the ministerial exception's role in preventing interference by the state in "the internal governance" of a religious institution and, with regards to the specific issue in the case, its "control over the selection of those who will personify its beliefs."²⁰² Put another way, *Hosanna-Tabor* declared that a religious institution need not proffer reasons for certain employment decisions, even when they might otherwise run afoul of employment discrimination law.²⁰³

On this reading, the limited sovereignty of religious institutions recognized in *Hosanna-Tabor* bears similarity to certain sovereignty-based accounts of the nature of property ownership. Echoing theories of institutional free exercise, Larissa Katz has argued that "in the case of private ownership, public and private authorities are conceptually distinct sources of authority, neither reducible nor traceable to the other."²⁰⁴ The authority of ownership is absolute in

201. This is a long-standing concern; as Eric Claeys observes in an essay analyzing in depth Locke's conception of private societies, Locke at points expressed strong criticisms of private associations. Eric R. Claeys, *The Private Society and the Liberal Public Good in John Locke's Thought*, 25 SOC. PHIL. & POL'Y 201, 203 (2008). Madison himself expressed significant concerns regarding "the indefinite accumulation of property . . . by ecclesiastical corporations" (and all corporations, for that matter). DETACHED MEMORANDA, *supra* note 76.

202. *Hosanna-Tabor Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012).

203. *See id.*

204. Larissa Katz, *Property's Sovereignty*, 18 THEORETICAL INQUIRIES IN L. 299, 302-03, 326 (2017) ("To respect and promote property rights, from this viewpoint, means the vindication and perhaps even the defense of the constitutional choice to establish a source of authority over private relations that is separate from and irreducible to public authority."). By viewing the allocation of private authority to property owners as "a particular political strategy, rather than a requirement of the rule of law or a reflection of pre-political rights," Katz's view of property rights diverges from accounts of institutional free exercise, which are prone to view this allocation as pre-political. *Id.* at 326. Katz's sovereignty-based account bears some semblance to how Gregory Alexander frames the proprietarian conception of property in the American colonies, as the Founding charters conveyed political authority along with land and "the significance of ownership of property was that it defined the scope of authority for governing." ALEXANDER, *supra* note 4, at 9. They diverge in that on Alexander's account those granted property in the colonial period were to exercise "their authority and property rights for the purpose of creating a

the sense that “owners are *absolved* from the normative constraints that legitimize public decisions. Owners are free to act on their private judgment about what ought to be done with a thing.”²⁰⁵ There is of course an important distinction between actions with regards to a thing and actions, in the context of a decision implicating the ministerial exception, that affect a person. But both accounts suggest a deference to private ordering within a separate sphere of authority set off by institutional free exercise rights and property rights (whether individual, collective, or communal) respectively. Just as one who freely enters another’s private property becomes subject to his or her private judgment regarding the use of that property, so too one might consent (expressly or implicitly) to the sovereign authority of a religious institution.²⁰⁶

In the property context, common interest communities or residential associations provide an example of private ordering to which courts have long been quite deferential.²⁰⁷ Although there is variation across jurisdictions, courts typically apply a reasonableness standard in reviewing challenges by a resident to a community association’s rules or a specific decision.²⁰⁸ Rules contained in the association’s originating covenants, which are a matter of public record, typically receive a higher level of deference, on the understanding that residents knowingly accepted those restrictions upon purchase and with the goals of promoting stability and private

properly ordered society.” *Id.* In contrast, Katz argues that ownership leaves owners with greater latitude to act upon their private judgment and that “owners are *absolved* from the normative constraints that legitimize public decisions,” a view that more closely parallels conceptions of sovereignty in the area of institutional free exercise. Katz, *supra*, at 304.

205. Katz, *supra* note 204, at 304.

206. See *Hosanna-Tabor*, 565 U.S. at 201 (Alito, J., concurring) (“All who unite themselves to [a voluntary religious association] do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.”) (quoting *Watson v. Jones*, 80 U.S. 679, 729 (1871)).

207. See Alexander, *supra* note 139, at 6.

208. See *id.* at 6 (“Courts have tended substantively to review these rules, applying a standard of reasonableness that requires the rules of the group to conform not only to the association’s own internal values but to external values as well—i.e., values that, in the court’s judgment, are widely shared throughout the rest of the polity.”); see also *Nahrstedt v. Lakeside Vill. Condo. Ass’n*, 8 Cal. 4th 361, 376, 380 (1994).

governance.²⁰⁹ At the same time, a review of such restrictions, while deferential, typically evaluates their reasonableness in light of significant external societal values, an approach in marked contrast with the Court's treatment of a religious institution's internal governance decisions in *Hosanna-Tabor*.²¹⁰

As Gregory Alexander has observed, for residential associations to foster some semblance of a group identity via private property, individual owners must sacrifice some degree of control "to the extent that individual control is inconsistent with maintenance of the group."²¹¹ Alexander contends, however, that for such groups to "realize their potential for creating community" they "must be held to an obligation more demanding than mere compliance with their own internal aspirations."²¹² Reasonableness review, rather than some stronger form of group autonomy, achieves this goal for residential communities while better comporting, on Alexander's account, with communitarian theory by keeping groups connected to one another and to the society at large.²¹³ Granting residential associations a lesser degree of deference than that afforded to the decisions of religious groups accords with a view of property rights as products of positive law, in contrast to pre-political or natural rights of religious liberty.²¹⁴

My goal here and in this Article is not to delineate with specificity the standards that courts should apply to the internal

209. Paula Franzese, *Common Interest Communities: Standards of Review and Review of Standards*, 3 WASH. U. J.L. & POL'Y 663, 669-71 (2000) ("A judicial posture grounded in considerations of reasonableness preserves the opportunity to consider the equities and protects against board abuse and unnecessary encroachments upon private behavior . . . the presumption of reasonableness afforded originating restrictions promotes stability and deters judges from substituting their judgment for that of the collective body.").

210. See *supra* note 208 and accompanying text; see also *Hosanna-Tabor*, 565 U.S. at 173.

211. See Alexander, *supra* note 139, at 12 ("Residential associations are a contemporary setting for this group-constitutive role of property and of restrictions on property use. Residential associations are the governance entities for territorial groups that are constituted with respect to particular assets, some of which are individually owned, others owned in common by group members. In this sense, these property restrictions are tied to group existence, for maintaining the character of the group requires that the association be able to enforce these property restrictions. This interpretation of residential association restrictions has guided the judicial reaction to recent challenges to these restrictions.").

212. *Id.* at 60.

213. See *id.* at 59-60.

214. See *Hosanna-Tabor*, 565 U.S. at 187.

decisions of various groups. Rather my intent is to merely suggest that while I am arguing that the communal exercise of both religious liberty and property rights plays an important foundational role for rights generally, the extent to which the internal governance of particular groups should be insulated from review varies. At one end of the spectrum, many religious communities, which the Court in *Hosanna-Tabor* declared are entitled to “special solicitude” under the First Amendment, are likely to be among the thickest normative communities and will be recognized as possessing rights in their corporate or institutional form independent of the rights of individual members.²¹⁵ At the other end we might place a common interest community, as well as other thinner forms of community united in significant part largely on the basis of some combination of spatial proximity, shared preferences, and utilitarian advantage, rather than a deep normative commitment. I still refer to these communities as normative, albeit in a weak sense, to the extent that, in the case of a homeowners association, for example, the association’s rules constitute shared norms.²¹⁶ A variety of non-religious private groups and associations will fall somewhere along this spectrum.

It is the nature of communities—to the extent that they “are constituted by shared commitments to some specific good”—to exclude, whether intentionally or not, those who do not share those same commitments.²¹⁷ As noted, my inclination, when questions of exclusion and discrimination arise is towards granting greater deference to thicker normative communities, including religious communities, and less protection to groups constituted largely on the basis of property rights. I acknowledge that exclusion has significant costs, but so too, as I have argued to this point, does the failure to protect communal and group rights, including the right to dissent

215. See *id.* at 173. For a discussion of “thick” and “thin” communities, see Glen O. Robinson, *Communities*, 83 VA. L. REV. 269, 275-76 (1997) (“[S]ociologists have distinguished groups of individuals bound together by kinship, ethnic, or religious affinities from the looser relationships that individuals form for utilitarian advantage, both commercial and political.”).

216. See Alexander, *supra* note 139, at 5 (“The normative canon of these residential arrangements consists of expressly stated rules in purchasers’ deeds that impose a wide variety of restrictions on members’ use of their property interests within the development.”).

217. See *id.* at 52 (“One of the central dilemmas of community concerns the relationship between the group and the rest of society, or what I will call the paradox of exclusion.”).

from prevailing norms.²¹⁸ To address concerns regarding exclusion and discrimination in a meaningful fashion is a project for a separate article. However, in Section III.B, discussing conflicts between individual property rights and religious liberty claims and equality norms, I briefly sketch a contextual approach to evaluating such conflicts and the competing interests they reflect.²¹⁹

In this Part, I have argued that the exercise of property rights and religious freedom by and within communities provides a more plausible foundation for rights more generally than the individual exercise of either right. The role these two rights play as foundations for other rights is mediated by particular social structures. These structures include communities that carve out a space within which important virtues are fostered, distinct normative commitments are developed and shared, and individual identities are formed.²²⁰ Such communities also, at times, act as important buffers between individuals and the state and facilitate collective action.²²¹ They can also strengthen the individual rights of non-members by instilling democratic norms, challenging and at times limiting the power of the state, and furthering a commitment to pluralism more generally.

III. DOCTRINAL IMPLICATIONS

Part II argued that religious freedom and the right to property are best understood as foundations for other rights in a less direct manner than is often claimed. Highlighting the role these rights play in the formation of normative communities that, in turn, strengthen the protection of other rights, yields a number of insights for existing legal doctrine. In this Part, I focus on communal activities at the nexus of property rights and religious liberty, examining how the synergistic relationship of property rights and religious liberty suggests a reappraisal of existing legal doctrines in three different contexts. I then briefly turn back to individual property and religious

218. For a fuller argument to this effect, defending robust protections for the right of assembly, while acknowledging the significant risks—including “racism, misogyny, and a parade of other evils”—that such protections pose, see John D. Inazu, *Factions for the Rest of Us*, 89 WASH. U. L. REV. 1435, 1446 (2012).

219. See *infra* Section III.B.

220. See PURDY, *supra* note 5, at 109; Peñalver, *supra* note 5, at 1900, 1917-18; Rose, *supra* note 11, at 365.

221. PURDY, *supra* note 5, at 109 (“Without enforceable rights in resources, cooperation stalls or breaks down, insecurity grows, and freedom shrinks in all its dimensions.”).

liberty claims to suggest how considering these rights together might yield new perspectives on conflicts involving equality norms.

A. Religious Community v. State

In this Section, I apply the analysis in Part II to a few examples at the nexus of property rights and religious liberty. The exercise of property rights can play an important and often indispensable role in furthering communal religious exercise. Property rights and religious liberty together create the space within which both communal and individual identity is formed and perpetuated.²²² These three examples reveal, in turn, how the communal exercise of property rights and religious liberty—given adequate protection in law—can enable the exercise of a broader set of individual rights, foster individual and communal autonomy and identity formation, and limit the power of the state.

1. *Making Space for Religious Communities and Their Members: RLUIPA*

The Religious Land Use and Institutionalized Persons Act (RLUIPA) seeks in part to protect religious landowners from the imposition, through a land use regulation, of a substantial burden on religious exercise.²²³ RLUIPA was passed in response to the Supreme Court's decision in *City of Boerne v. Flores*.²²⁴ *City of Boerne* declared portions of the Religious Freedom Restoration Act (RFRA) invalid.²²⁵ RFRA prohibits the imposition of a substantial burden on a person's religious exercise, even if the burden results from a generally applicable law, unless the law furthers a "compelling governmental interest" through the "least restrictive means."²²⁶ In

222. See Rose, *supra* note 11, at 365.

223. See Infranca, *supra* note 23, at 1726.

224. See 42 U.S.C. § 2000cc (2012). See also Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311, 323-24 (2003) (reviewing precursors to RLUIPA and legislative history).

225. *City of Boerne v. Flores*, 521 U.S. 507, 533-36 (1997). Congress passed RFRA in response to the Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 881 (1990) (declaring the Free Exercise clause alone does not bar application of a "neutral, generally applicable law to religiously motivated action").

226. § 2000bb-1(b). RFRA was intended "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963)[,] and *Wisconsin v.*

City of Boerne the Court struck down the application of RFRA to states and localities, declaring that those provisions exceeded the scope of Section Five of the Fourteenth Amendment, which empowers Congress to pass remedial laws to enforce the Amendment's due process and equal protection provisions.²²⁷

RLUIPA represented an "unusual alliance" on behalf of religious property owners and prisoners, forged in part to avoid the problems that proved fatal for RFRA by narrowly focusing on areas where Congress was confident it possessed the power to legislate.²²⁸ Congress sought to avoid RFRA's fate by limiting the new statute's application to programs that receive federal financial assistance, regulations that affect commerce, and substantial burdens "imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved."²²⁹ No specific hearings were held on RLUIPA, but testimony regarding a failed piece of legislation, the Religious Liberty Protection Act (RLPA), is considered part of RLUIPA's legislative history.²³⁰ While some of this testimony asserted that religious institutions faced significant challenges in the context of land use,²³¹ critics argue that substantial opposition to the bill was

Yoder, 406 U.S. 205 (1972)[,] and to guarantee its application in all cases where free exercise of religion is substantially burdened." Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 2(b), 107 Stat. 1488. This discussion draws in part on *Infranca*, *supra* note 23, at 1703-07, which provides a more detailed discussion of RLUIPA's legislative history and statutory language.

227. 521 U.S. at 533-36.

228. See Zachary Bray, *RLUIPA and the Limits of Religious Institutionalism*, 2016 UTAH L. REV. 41, 70 (2016).

229. See § 2000cc(a)(2)(C).

230. See Hamilton, *supra* note 224, at 334 ("No hearings were held on RLUIPA per se; rather, the hearings on RLPA generally addressing land use law were supposed to stand in as hearings in support of RLUIPA.").

231. *Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 134 (1998) (statement of W. Cole Durham, Jr., Brigham Young University Law School) ("When I was invited to appear at this Hearing, I was asked to focus in particular on religious freedom issues that arise in the area of land use. In the balance of my remarks, I will turn to this area. In my view, the problems encountered by religious organizations in the area of land use are symptomatic of a larger set of problems that religious organizations face in the modern regulatory state.").

excluded and that religious communities faced no significant discrimination in the land use realm.²³²

Criticisms of RLUIPA's land use provisions are grounded in part in the perception that there is no defensible theoretical basis for providing additional protections for the property rights of religious institutions in the particular context of public land use controls.²³³ The statute appears instead to be the product of a convenient compromise and a congressional desire to do *something* on behalf of religious liberty in the limited realms left to it by the Court.²³⁴ But another way to interpret RLUIPA would be to say that, whether intentionally or not, Congress seized upon an area of distinct importance for religious communities and their individual members.

Property plays a vital and unique role in the formation of individual and group identity.²³⁵ By severely restricting an institution's ability to engage in certain uses of its property, particularly uses central to the development and perpetuation of the group's identity, beliefs, and practices, land use regulations pose a

232. See Bray, *supra* note 228, at 71 (citing scholars who question whether religious communities face significant discrimination in the land use realm). In a prior work, I argued at length in favor of an institutional approach to evaluating RLUIPA claims, a position that was thoughtfully critiqued by Zachary Bray in a recent article. See Infranca, *supra* note 23; see also Bray, *supra* note 228, at 81 ("I take Infranca's account to be essentially the best and most thoughtful case that could be made for an institutional approach to RLUIPA, while concluding that the problems with an institutional approach, identified in this Article, are so significant that any such approach should be rejected."). I do not have space in this Article to adequately respond to Professor Bray's analysis of the potential problems with an institutional approach to RLUIPA. Instead, I wish to briefly suggest how the prior discussion in this Article might inform our understanding of RLUIPA.

233. See, e.g., Marci A. Hamilton, *RLUIPA Is a Bridge Too Far: Inconvenience Is Not Discrimination*, 39 FORDHAM URB. L.J. 959 (2012).

234. See Hamilton, *supra* note 224, at 323.

235. A number of legal commentators have discussed the similar relationship between property and group identity. See, e.g., Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1028 (2009) ("[C]ertain lands, resources, and expressions are entitled to legal protection as cultural property because they are integral to the group identity and cultural survival of indigenous peoples."); Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 566 (1995) ("[C]ultural property embodies the physical manifestation of a group's identity."); see also Alison Ledgerwood, Ido Liviatan & Peter J. Carnevale, *Group-Identity Completion and the Symbolic Value of Property*, 18 PSYCHOL. SCI. 873, 877 (2007) (finding "that group identity, like personal identity, can be conceptualized as a goal toward which group members willfully strive, and that such goal striving is reflected in the value placed on potential symbols of group identity[,] including property).

distinct risk to that institutional identity, as well as to the continued flourishing of often marginalized communities. Disputes over Muslim cemeteries²³⁶ and mosques²³⁷ reflect this reality. As an expert on death rituals in Islam recently declared: “This is part of a wider anxiety over integration and the place of Muslims in America and the extent to which Muslims are allowed to carve spaces in the country that are their own, for their own rituals and their own community.”²³⁸ Discussing the 2010 controversy over the Park51 Muslim community center in lower Manhattan, Winnifred Sullivan has observed that similar protests, fueled by “[f]ear of an immigrant religion,” confronted efforts to build a Catholic church just blocks away in 1785.²³⁹ RLUIPA reflects the important role such spaces play for religious communities. By facilitating the entry of such communities into localities where they would otherwise be excluded, it also provides a highly visible signal of a societal commitment to the free exercise of religion and minority rights more generally.

This relationship between religious freedom and property rights in the context of RLUIPA might be understood as akin to what

236. See, e.g., David DeKok, *Pennsylvania Township Nixes Proposed Islamic Cemetery, Appeal Likely*, REUTERS (Mar. 24, 2015), <http://www.reuters.com/article/us-usa-pennsylvania-cemetery/pennsylvania-township-nixes-proposed-islamic-cemetery-appeal-likely-idUSKBN0MK2MQ20150324> [<https://perma.cc/VY9F-5J8P>] (“Fights over proposed Islamic cemeteries have taken place over the past year in Las Vegas; Walpole, Massachusetts; Kuna, Idaho; Murfreesboro, Tennessee and Louisville, Kentucky.”); Mukhtar Ibrahim, *Castle Rock Township Must Allow Islamic Cemetery, Judge Rules*, MINN. PUB. RADIO NEWS (Feb. 1, 2016), <https://www.mprnews.org/story/2016/02/01/dakota-county-ruling-islamic-cemetery-muslim-religious-discrimination> [<https://perma.cc/5DHB-QXK6>]; Patrick Strickland, *Plan to Create Muslim Cemetery Sparks Uproar in Texas City*, AL JAZEERA AM. (Aug. 13, 2015), <http://america.aljazeera.com/articles/2015/8/13/bid-to-develop-islamic-cemetery-sparks-uproar-in-texas-town.html> [<https://perma.cc/S7GS-UE2T>].

237. See Eric Treene, *RLUIPA and Mosques: Enforcing a Fundamental Right in Challenging Times*, 10 FIRST AMEND. L. REV. 330, 345 (2012) (“While Muslims make up an estimated 1% to 2% of the population, 14% of RLUIPA investigations opened by the Civil Rights Division in RLUIPA’s first ten years involved mosques or Muslim schools.”).

238. Jess Bidgood, *Muslims Seek New Burial Ground, and a Small Town Balks*, N.Y. TIMES, Aug. 28, 2016 (quoting Leor Halevi, associate professor of history at Vanderbilt University). See Emma Green, *A New Jersey Mosque Wins in a Religious-Discrimination Lawsuit—Over Parking Lots*, THE ATLANTIC, May 30, 2017 (reporting that local planning board, which rejected mosque proposal, “heard testimony that [Islamic Society of Basking Ridge’s] members were a ‘different kind of population instead of the normal Judeo-Christian population’”).

239. Winnifred Fallers Sullivan, *Religion, Land, and Rights*, in BUFF. LEGAL STUD. RES. PAPER SERIES 1, 3 (2010).

Timothy Zick terms “rights dynamism.”²⁴⁰ Zick argues that the Supreme Court, in a series of mid-twentieth century cases involving the Jehovah’s Witnesses, interpreted First Amendment rights “in a manner that highlighted their synergistic and collaborative relationship. . . . [R]ecognition and enforcement of expressive rights created public breathing space for the free exercise of religion. In turn, recognition of free exercise rights helped to create a stronger foundation for expressive rights.”²⁴¹ Zick’s conception of rights dynamism suggests a theoretical justification for RLUIPA. Although the statute is typically understood in relationship to religious freedom, it protects religious freedom by, in part, strengthening the property rights of religious communities. As such the statute can be read to reflect an implicit recognition of the synergistic relationship between religious freedom and property rights, particularly in the context of religious communities, which, like all associations, are highly dependent upon physical space.²⁴²

2. *Protecting Identity: Native American Sacred Land*

In *Wisconsin v. Yoder* the Supreme Court held that compulsory school attendance laws could not be applied to Amish and Mennonite parents who, for religious reasons, refused to send their children to school beyond the eighth grade.²⁴³ The law was challenged under the Free Exercise Clause, and the Court’s opinion analyzed the extent to which the requirement of high school attendance coerced Amish individuals into acting contrary to their

240. See Timothy Zick, *Rights Dynamism*, 19 U. PA. J. CONST. L. 791 (2017).

241. *Id.* at 836. Andre van der Walt suggested an analogous role for property rights in certain contexts. He offered as an example the textual protections for property in the South African Constitution, which, while not “systemically necessary” to promote the explicit right to housing, “could be relied on strategically to support” that separately enumerated right. AJ van der Walt, *The Modest Systemic Status of Property Rights*, 1 J.L. PROP. & SOC’Y 15, 104 (2014).

242. As Justice Sotomayor recently wrote in dissent in *Trinity Lutheran*, “A house of worship exists to foster and further religious exercise. There, a group of people, bound by common religious beliefs, comes together ‘to shape its own faith and mission.’” *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2029 (2017) (Sotomayor, J., dissenting) (citing *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012)). “Within its walls, worshippers gather to practice and reaffirm their faith. And from its base, the faithful reach out to those not yet convinced of the group’s beliefs.” *Id.*

243. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

religious beliefs.²⁴⁴ The decision also relied upon the testimony of expert witnesses who declared that requiring high school attendance posed an existential threat to Amish communities.²⁴⁵ The Amish way of life, the Court declared, “is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living.”²⁴⁶ Requiring secondary schooling would substantially interfere with the Amish child’s “integration into the way of life of the Amish faith community.”²⁴⁷ Mandatory attendance would impede the ability of the Amish community to impart its values and way of life.²⁴⁸

This language in *Wisconsin v. Yoder* suggests that the effect mandatory high school attendance would have on the continued existence of the Amish community influenced the Court’s Free Exercise analysis.²⁴⁹ However, in its subsequent decision in *Lyng v. Northwest Indian Cemetery Protective Ass’n*, the Court declared that Government actions that “could have devastating effects on traditional Indian religious practices,” but did not coerce individuals to act contrary to their religious beliefs, were not cognizable under the Free Exercise Clause.²⁵⁰ In dissent Justice Brennan contended that coerced action contrary to an individual’s religious beliefs does not “exhaust[] the range of religious burdens recognized under the Free Exercise Clause.”²⁵¹ He argued that *Yoder* turned not on the coercive effect of the law on individuals, but rather on the mandatory attendance law’s impact on “the continued survival of Amish communities.”²⁵²

244. See *id.* at 207. In *Smith*, the Court sought to distinguish *Yoder* by classifying it as an example of a hybrid case in which a “neutral, generally applicable law” implicates both the Free Exercise Clause and another constitutional protection, namely the “right of parents . . . to direct the education of their children.” *Emp’t Div., Dept. of Human Res. v. Smith*, 494 U.S. 872, 881 (1990). See *Yoder*, 406 U.S. at 233 (“[W]hen the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a ‘reasonable relation to some purpose within the competency of the State’ is required to sustain the validity of the State’s requirement under the First Amendment.”).

245. See *Yoder*, 406 U.S. at 209, 212, 217.

246. *Id.* at 216.

247. *Id.* at 218.

248. *Id.* at 211-12.

249. See *id.*

250. *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 450-51 (1988).

251. *Id.* at 466 (Brennan, J., dissenting).

252. *Id.* (quoting *Yoder*, 406 U.S. at 209).

Justice Brennan's dissent emphasized the importance of specific locations for Native American religious beliefs and communal ceremonies: "Rituals are performed in prescribed locations not merely as a matter of traditional orthodoxy, but because land, like all other living things, is unique, and specific sites possess different spiritual properties and significance. Within this belief system, therefore, land is not fungible" ²⁵³ The majority in *Lyng* asserted that to provide relief to Native Americans challenging specific Government actions on Government—not tribal—land would effectively grant the challengers "*de facto* beneficial ownership" of Government land, divesting the government of the right to use its own land. ²⁵⁴ Rather than demand exclusive use and possession of the land in question, however, the Native American respondents simply asked the Government to not engage in a particular activity—construction of a road segment.

The majority opinion hinted at a better way to evaluate the case. Discussing the government's property rights, it concluded, albeit with little analysis, that "the diminution of the Government's property rights, and the concomitant subsidy of the Indian religion, would in this case be far from trivial." ²⁵⁵ This suggests that the claims in *Lyng* and similar cases should be evaluated in light of both free exercise and property law principles, even while acknowledging that the dispute arose on land owned by the federal government. Along these lines, Kristen Carpenter has explored a variety of ways in which, even in cases where they are non-owners, Indian nations might invoke property rights in claims involving sacred sites on government land. ²⁵⁶ Recognition of the relationship between

253. *Id.* at 460-61 ("Where dogma lies at the heart of Western religions, Native American faith is inextricably bound to the use of land."). See Paul Baumgardner, *Your Land Is Holy to Me: The Constitutional Battle to Access Sacred Sites on Public Lands*, 59 J. CHURCH & STATE 205, 208 (2015) ("Stewardship of the natural world and right relation to the land are cardinal commitments to many Native American religions."); Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. Rev. 1061, 1063 (2005) ("Tribal cultures, from the time of their creation, have been formed, shaped, and renewed in relationship with mountains, mesas, lakes, rivers, and other places that are imbued with the spirituality, history, knowledge, and identity of the people.").

254. *Lyng*, 485 U.S. at 453.

255. *Id.* at 453 (noting that it would forbid commercial timber harvesting and road construction in 17,000 acres of public land). But see *id.* at 477 (Brennan, J., dissenting) (describing road as "marginally useful").

256. See generally Carpenter, *supra* note 253.

religious liberty and property rights in the context of communities, and its implication for individual rights more generally, would strengthen such claims. It calls for an analysis similar to that proposed by Justice Brennan's dissent in *Lyng*, one that does not demand a showing of coercion to establish a free exercise claim, but instead emphasizes the concept of interference with communal religious practices and identity, as the Court did in the early church property disputes and in *Wisconsin v. Yoder*.²⁵⁷ The provision and use of a physical space free from interference is one of the primary mechanisms through which property rights are traditionally understood to foster autonomy and identity formation and to promote freedom.²⁵⁸

3. Challenging the State: Sanctuary Churches

Since the election of President Donald Trump, a growing number of religious communities have declared themselves "sanctuaries" for undocumented immigrants at risk of deportation.²⁵⁹ Members of the New Sanctuary Movement sign a pledge that states:

257. For example, in *Kedroff*, the Court emphasized the concept of interference in evaluating the free exercise claim, declaring that a religious organization's freedom to select its clergy has "federal constitutional protection as a part of the free exercise of religion against state interference." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). See *Lyng*, 485 U.S. at 469 (Brennan, J., dissenting) ("While I agree that governmental action that simply offends religious sensibilities may not be challenged under the [Free Exercise] Clause, we have recognized that laws that affect spiritual development by impeding the integration of children into the religious community or by increasing the expense of adherence to religious principles—in short, laws that frustrate or inhibit religious *practice*—trigger the protections of the constitutional guarantee."); *Yoder*, 406 U.S. at 218; Marc O. DeGirolami, *Substantial Burdens Imply Central Beliefs*, U. ILL. L. REV. 19, 22-23 (2016) (critiquing decision in *Lyng* and arguing that "interference, rather than coercion, is the more natural interpretation of a burden").

258. See, e.g., Barros, *supra* note 60, at 47 (discussing "highly spatialized" conception of the relationship between property and freedom).

259. See, e.g., Laurie Goodstein, *Houses of Worship Poised to Serve as Trump-Era Immigrant Sanctuaries*, N.Y. TIMES, Dec. 27, 2016, <https://www.nytimes.com/2016/12/27/us/houses-of-worship-poised-to-serve-as-trump-era-immigrant-sanctuaries.html> [<https://perma.cc/T7QQ-MJVM>] (discussing examples of sanctuary churches); Tatiana Sanchez, *In Trump Era, Bay Area Churches Offer Sanctuary to Undocumented Immigrants*, MERCURY NEWS, Feb. 5, 2017, <http://www.mercurynews.com/2017/02/05/in-trump-era-bay-area-churches-offer-sanctuary-to-undocumented-immigrants/> [<https://perma.cc/AF6F-59VU>] (stating that "[d]ozens of Bay Area churches have declared themselves 'sanctuary churches' in recent months," joining hundreds of others nationwide that have vowed

As people of faith and people of conscience, we pledge to resist the newly elected administration's policy proposals to target and deport millions of undocumented immigrants and discriminate against marginalized communities. We will open up our congregations and communities as sanctuary spaces for those targeted by hate, and work alongside our friends, families, and neighbors to ensure the dignity and human rights of all people.²⁶⁰

The language of this pledge includes two particularly relevant components: a statement of resistance to official government policy and a declaration that the communities will “open up” a “sanctuary space.”²⁶¹ This New Sanctuary Movement began as a response to the immigration enforcement efforts of the Bush and Obama administrations.²⁶² The name references the earlier “Sanctuary Movement” of the 1980s, which provided shelter to undocumented migrants in the United States facing deportation to war-ravaged countries in Central America.²⁶³ At that time, over 300 local churches and a range of national religious bodies declared themselves sanctuaries, both physically harboring undocumented individuals and publicly declaring their intent to violate the Immigration and Nationality Act.²⁶⁴

The first church to formally declare itself a sanctuary, Tucson's Southside Presbyterian Church, issued a letter that asserted the community's “God-given right to aid any one fleeing from persecution and murder . . . [despite the fact that] [t]he current administration of United States law prohibits us from sheltering these [undocumented] refugees.”²⁶⁵ This declaration reflected the church community's reliance on its physical property to provide sanctuary,

to protect their most vulnerable parishioners—even if that puts them at odds with federal policy or law).

260. SANCTUARY MOVEMENT, [http://www.sanctuarynotdeportation.org/\[https://perma.cc/5C3Q-C7Q8\]](http://www.sanctuarynotdeportation.org/[https://perma.cc/5C3Q-C7Q8]) (last visited Oct. 23, 2017).

261. *See id.*

262. Kristina M. Campbell, *Humanitarian Aid Is Never a Crime? The Politics of Immigration Enforcement and the Provision of Sanctuary*, 63 SYRACUSE L. REV. 71, 103 (2012).

263. *See id.* at 101-02 (“[A]t the time the United States government was denying Central American asylum applications as a matter of policy—categorizing refugees from El Salvador, Guatemala, and Nicaragua as ‘economic’ refugees, ineligible as a matter of law to receive political asylum.”).

264. Gregory A. Loken & Lisa R. Bambino, *Harboring, Sanctuary and the Crime of Charity under Federal Immigration Law*, 28 HARV. C.R.-C.L. L. REV. 119, 122-23 (1993).

265. *Id.* at 123 (quoting Letter from Rev. John Fife to William French Smith (Mar. 23, 1982)).

exercise its “God-given right,” and publicly express its opposition to a government policy.²⁶⁶ Sanctuary churches did so despite the fact that federal courts declared their actions a felony in violation of Section 274(a) of the Immigration and Nationality Act, which prohibits concealing, harboring, or shielding an undocumented individual.²⁶⁷ The provision of sanctuary, including physical shelter on church property, was understood as a “moral duty” undertaken, in part, in an effort to bring changes to existing government policy.²⁶⁸ As such, providers of sanctuary, both in the earlier movement and the most recent iteration, do not seek to conceal their actions.²⁶⁹

Although they might designate themselves “sanctuaries,” such churches cannot assure an individual who stays within their property will be protected from civil authorities.²⁷⁰ Under the Obama administration, churches were able to rely upon a 2011 memorandum from the then-Director of Immigration and Customs Enforcement (ICE), which declared that ICE would not, generally, conduct enforcement actions in certain “sensitive locations,” including

266. Barbara Bezdek, *Religious Outlaws: Narratives of Legality and the Politics of Citizen Interpretation*, 62 TENN. L. REV. 899, 903, 942 (1995) (“The defendants in [legal actions prosecuting members of Sanctuary Movement] understood their Sanctuary efforts as an integral part of a religiously directed way of life, in which they had been able to respond to refugees with shelter and protection from the persecution and strife that the refugees fled.”).

267. See Loken & Bambino, *supra* note 264, at 124; see also 8 U.S.C. § 1324(a)(1)(A)(iii) (2005) (outlining criminal penalties for any person who “knowing[ly] or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation”); Rose Cuison Villazor, *What Is a “Sanctuary”?*, 61 SMU L. REV. 133, 141 (2008) (“Although the federal government initially treated the sanctuary movement of the 1980s with minimal resistance, it eventually prosecuted individuals who were involved with the network.”).

268. Villazor, *supra* note 267, at 140-41.

269. See Loken & Bambino, *supra* note 264, at 141 (“The broadest contingent of sanctuary churches and workers have been engaged in the reactive, *non-clandestine shelter* of the undocumented.”) (emphasis added); Villazor, *supra* note 267, at 146 (“[T]he New Sanctuary Movement argues that their actions do not violate immigration laws because they are not concealing the identity of the families to whom they are providing shelter and assistance.”).

270. See Philip Bump, *The Looming Conflict Between Trump’s Immigration Sweeps and Religious Freedom*, WASH. POST (Feb. 12, 2017), https://www.washingtonpost.com/news/politics/wp/2017/02/12/the-looming-conflict-between-trumps-immigration-sweeps-and-religious-freedom/?utm_term=.19d1d5e62c9c [<https://perma.cc/ZGQ2-KLSV>].

“churches, synagogues, mosques or other institutions of worship, such as buildings rented for the purpose of religious services.”²⁷¹

During the Sanctuary Movement of the 1980s, the Ninth Circuit rejected a free exercise challenge to enforcement of the Immigration and Nationality Act’s prohibition on harboring undocumented individuals.²⁷² The court’s decision in *Aguilar* relied in part on a prior Fifth Circuit decision.²⁷³ In that case the court confronted a similar claim and found it lacked merit in part due to the testimony of Catholic and Methodist clergy, none of whom “suggested that devout Christian belief mandates participation in the ‘sanctuary movement.’”²⁷⁴ The *Aguilar* court’s treatment of the defendant’s free exercise claim accords with the Supreme Court’s later evaluation of a free exercise claim in *Employment Division v. Smith*, which upheld the denial of unemployment benefits to members of the Native American Church who lost their jobs when they violated a generally applicable state law by using peyote during a religious ritual.²⁷⁵

The Supreme Court subsequently distinguished *Employment Division v. Smith* in *Hosanna-Tabor*, which, as discussed earlier, involved “government interference with an internal church decision that affects the faith and mission of the church itself,” namely a religious group’s selection of its ministers.²⁷⁶ The Court contrasted this internal governance decision with the issue in *Smith*, which involved “government regulation of only outward physical acts.”²⁷⁷ Although in *Hosanna-Tabor* the Court expressly limited its holding to a determination that the ministerial exception bars employment

271. U.S. Immigration & Customs Enf’t, Memorandum on Enforcement Actions at or Focused on Sensitive Locations, Policy No. 10029.2, (Oct. 24, 2011), <https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf>.

272. *United States v. Aguilar*, 883 F.2d 662, 694-95 (9th Cir. 1989), *cert. denied*, 498 U.S. 1046 (1991) (“Even assuming that appellants have proved that the enforcement of sections 1324 and 1325 interfered with their religious beliefs, they cannot escape the government’s overriding interest in policing its borders.”). Free exercise claims were also rejected in other cases involving the sanctuary movements, including *American Baptist Churches v. Meese*, 712 F. Supp. 756, 760-62 (N.D. Cal. 1989), and *Presbyterian Church v. United States*, 870 F.2d 518, 527 (9th Cir. 1989).

273. *See Aguilar*, 883 F.2d at 694.

274. *United States v. Merkt*, 794 F.2d 950, 956 (5th Cir. 1986).

275. *See Emp’t Div., Dep’t Human Res. v. Smith*, 494 U.S. 872, 872-73 (1990).

276. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012).

277. *Id.*

discrimination suits by a minister,²⁷⁸ an argument might be made that the decision's logic has broader implications and provides some support for religious institutions seeking to challenge federal immigration laws.

The primary challenge for such claims, however, is the fact that providing sanctuary seems to be something more readily classified as an "outward physical act," rather than an "internal governance" decision affecting a religious community's "right to shape its own faith and mission through its appointments."²⁷⁹ It is here that the interaction of the free exercise claim and a property right might strengthen the religious community's claim. While providing sanctuary might not be an "internal governance" decision, it does occur within the church's private property and, in that sense, might be framed as an internal act taken pursuant to the religious community's faith and mission and which in turn shapes that faith and mission.

Moreover, as I suggested in a prior work, communal or institutional free exercise claims potentially blur the distinction drawn by the Supreme Court between protections for religious belief and opinion and protections for practices.²⁸⁰ In *Employment Division v. Smith* the Court declared that the government may not regulate "religious *beliefs* as such"²⁸¹ but may interfere with overt religious acts.²⁸² However, if the central or defining religious exercise of a religious community or institution is, in the words of Justice Brennan, the perpetuation of an "ongoing tradition of shared beliefs,"²⁸³ then interference with certain communal acts that instantiate and sustain those shared beliefs may be understood to impinge upon those beliefs in a way that is not true for individuals. For while an individual's beliefs may take form in his or her conscience or mind, a community or institution's beliefs and identity take form and existence in the physical world. Institutions are formed to promote and perpetuate these beliefs, which they do in part

278. See *id.* at 190, 194.

279. *Id.* at 188.

280. The discussion in this paragraph is drawn from Infranca, *supra* note 23, at 1727; see also *Smith*, 494 U.S. at 877-79 (declaring that "while [government regulations] cannot interfere with mere religious belief and opinions, they may with practices").

281. *Id.* at 877 (quoting *Sherbert v. Verner*, 374 U.S. 398, 402 (1963)).

282. *Id.* at 878-80.

283. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 341-42 (1987) (Brennan, J., concurring).

through their use of and actions in physical spaces.²⁸⁴ Restrictions upon a religious community or institution's ability to engage in the outward acts through which beliefs are developed, witnessed, and transferred over time—particularly those that occur within the institution's private property—may, therefore, constitute a regulation of the beliefs themselves and substantially burden the community's process of identity formation and transmission.²⁸⁵ In *Wisconsin v. Yoder* the Court hinted at this point when it declared that, although the Amish parents were convicted for the "action" of refusing to send their children to school, "in this context belief and action cannot be neatly confined in logic-tight compartments."²⁸⁶ Government intrusion on the provision of sanctuary directly impinges upon the religious community's ability to express, in word and deed, its belief and mission.

The three examples in this Section suggest a few mechanisms by which religious communities, through the exercise of both property rights and religious liberty, can serve to limit the power of the state and provide a foundation for individual rights. Such communities carve out a literal space within which individual rights are exercised and individual and communal identities are developed and expressed. They contribute to a more pluralistic society. And they provide the means for collective action challenging the state and protecting vulnerable individuals.

B. The Right to Property and Religious Freedom at the Individual Level

This Article has argued that religious freedom and the right to property play distinct roles in the formation and perpetuation of normative communities. These communities, in turn, provide a more plausible foundation and source of protection for individual rights more generally than does the individual exercise of either right. At the same time, the distinct importance of religious freedom and the

284. The *Oxford English Dictionary* defines an "institution" as "[a]n establishment, organization, or association, instituted for the promotion of some object." 7 THE OXFORD ENGLISH DICTIONARY 1046-47 (2d ed. 1989).

285. In *Hosanna-Tabor* the Court distinguished *Smith*, which "involved government regulation of only outward physical acts," from the case before it, which involved "an internal church decision that affects the faith and mission of the church itself." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012).

286. *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972).

right to property for such communities depends in part upon a broader recognition of the role these rights play in the formation of individual identity. In this Section I suggest a few implications of the foregoing discussion for thinking about the interaction of property rights and religious freedom at the individual level.

The roles that property and religious exercise play in relation to identity formation and individual autonomy are particularly relevant to disputes between religious freedom and property rights, on the one hand, and equality norms on the other hand. The most high-profile of such conflicts include those involving the claims of religious business owners who seek accommodations in the context of laws that bar discrimination on the basis of sexual orientation. Despite the significant attention such cases receive, Christopher Lund, in an article analyzing claims under the federal Religious Freedom Restoration Act (RFRA) and similar state laws, found that cases with claims akin to the highest-profile cases, *Burwell v. Hobby Lobby Stores Inc.*²⁸⁷ and *Elane Photography, LLC v. Willock*,²⁸⁸ are statistical outliers and generally unsuccessful.²⁸⁹

These cases typically focus on free exercise claims and related First Amendment rights. The property angle and synergies between property rights and free exercise are often underappreciated. Deeper consideration of the relationship between property and personhood suggests new ways to balance the competing rights claims that arise in these cases. Rather than focusing narrowly on the conflict between First Amendment rights and non-discrimination laws, such an analysis would expand the inquiry to consider the broader context in

287. 134 S. Ct. 2751 (2014).

288. 309 P.3d 53, 59 (N.M. 2013) (rejecting free exercise and other claims of wedding photographer who refused to photograph same-sex wedding, in violation of state Human Rights Law). The court also rejected a claim pursuant to the New Mexico Religious Freedom Restoration Act on the grounds that the statute did not apply to suits between private parties. *Id.*

289. Christopher C. Lund, *RFRA, State RFRA, and Religious Minorities*, 53 SAN DIEGO L. REV. 163, 164 (2016). According to Lund, while “[t]here have probably been around a few hundred state RFRA cases,” only two (“*Elane Photography* itself, and a recent addition, *Arlene’s Flowers*”) raise issues involving “discrimination or sexual morality or the culture wars.” *Id.* at 164-65. The Washington State Supreme Court rejected *Arlene’s Flowers’* challenge—which raised free exercise, free speech, and free association claims—to the state’s public accommodation law. *State v. Arlene’s Flowers, Inc.*, 389 P.3d 543, 548 (Wash. 2017). The owner of *Arlene’s Flowers* refused to provide flowers for the wedding of a gay couple who had been long-standing customers, in violation of the state’s public accommodation law, which bars discrimination on the basis of sexual orientation. *Id.* at 549.

which a given dispute arises. Along these lines, Robert Vischer has argued that more attention should be paid to how the actions of individuals seeking an exemption from a non-discrimination law would affect the marketplace for the good or service in question.²⁹⁰ Vischer proposes that while individuals who seek to act on the basis of conscience “should have the freedom to create an economically viable agency with a distinct moral identity; they should not have the authority to hinder the cultivation of another agency’s conflicting, nondiscriminatory moral identity.”²⁹¹ This Article’s analysis suggests something similar, that claims for an exemption from non-discrimination laws grounded in both the right to property and religious liberty, to the extent they are necessary for the formation and expression of a distinct personal identity, should trump competing claims, except in situations in which protecting such claims significantly curtails the ability of others to form and express their own identity.²⁹²

Careful consideration of the interaction of property rights and religious freedom in such disputes suggests a more nuanced analytical framework. Rather than solely focusing on the market effects of permitting an exemption from non-discrimination laws, it would call for an initial determination of where a given service or good falls along a continuum akin to that proposed by Margaret Radin between personal and fungible property.²⁹³ The Fair Housing Act’s so-called “Mrs. Murphy exception” might provide a helpful touchstone for such an inquiry. This provision exempts certain small-

290. ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE 4 (2010).

291. *Id.* at 5.

292. Such an approach bears resemblance to the treatment of property in German constitutional law. “In German constitutional law, property is a fundamental right that is accorded the highest degree of protection only in cases in which the affected interest immediately at stake implicates the owner’s ability to act as an autonomous moral and political agent.” Gregory S. Alexander, *Property as a Fundamental Constitutional Right? The German Example*, 88 CORNELL L. REV. 733, 739 (2003); *c.f.* Alan Brownstein, *Protecting the Religious Liberty of Religious Institutions*, 21 J. CONTEMP. LEGAL ISSUES 201, 210 (2013) (“From a constitutional or legal perspective, not all personal decisions and relationships are intrinsic to the dignity of the individual. Some choices are peripheral and minor aspects of our identity. Other actions are problematic because of their impact on others. There are limits to the extent that a person can claim a dignitary interest in causing harm to others or subordinating the autonomy of third parties to his control. We do not recognize a dignitary interest in acquiring or owning slaves, to cite an obvious example.”).

293. *See supra* note 167 and accompanying text.

scale property owners from elements of the Fair Housing Act's anti-discrimination provisions for rationales that include protecting the privacy of the home (in what can be interpreted as an implicit recognition of strong personhood interests in the home).²⁹⁴ Similarly, the bundle-of-rights concept of property provides another useful framework for evaluating these claims. As Jane Baron has suggested, the bundle-of-rights metaphor can help to frame questions and to elicit information useful for resolving conflicts.²⁹⁵ For example, in determining whether a property owner can exercise a right to exclude, the bundle-of-rights metaphor calls for determining "the quality of the interaction among the parties, the property institution in which the interaction was situated, and its capacity to promote reciprocity or domination."²⁹⁶ An analysis might then proceed to evaluate the effects of the owner's assertion of a right to exclude on the non-owner, "whether the parties are symmetrically or asymmetrically vulnerable to one another or whether they stand in positions of equal (or unequal) respect and dignity."²⁹⁷ Such a context-specific analysis of the exercise of a property right (or a claim of religious liberty) enables a clearer determination of the consequences of that exercise.²⁹⁸

The application of a similar analytical framework to questions of group exclusion would suggest stronger protections for minority groups, whose exclusionary acts, on balance, will likely have less of an effect on those excluded than the acts of a large group. Moreover, to the extent that such groups are likely, by virtue of their minority status, to find their own normative commitments and identity less reflected in the society at large, they arguably have more to lose—in relation to those commitments and that identity—when societal norms of any kind are allowed to trump the exercise of their communal rights.

Finally, it bears noting that by foregrounding the importance of property rights in disputes where they are often ignored, this approach reveals a paradox of sorts. To the extent that protections for

294. See Robin Fretwell Wilson, *Bargaining for Civil Rights: Lessons from Mrs. Murphy for Same-Sex Marriage and LGBT Rights*, 95 B.U. L. REV. 951, 973-76 (2015) (discussing history and reasoning of the "Mrs. Murphy" exception to the Fair Housing Act).

295. See Jane B. Baron, *Rescuing the Bundle-of-Rights Metaphor in Property Law*, 82 U. CIN. L. REV. 57, 89 (2013).

296. *Id.* at 92.

297. *Id.*

298. See *id.*

property rights wax and wane depending on the interaction of underlying values such as personhood and autonomy, this would seem to undermine the contention that property rights are foundational.²⁹⁹ This apparent tension might be resolved by proposing a more “bottom-up” conception of the foundational nature of property rights. On such an account, a given society might have a particular vision of freedom and rights generally and might then structure particular institutions, such as the right to property, in a way that enables those other freedoms to flourish. Although the right in question is not prior in time or importance to these other rights or values, it would still play a certain role as a foundation.³⁰⁰ This reflects the more instrumental understanding of a foundation discussed above.³⁰¹ Reconciling competing claims of free exercise rights and other civil rights is a complex issue for which a proper treatment would demand significantly more space. My intent here is merely to suggest how considering the interaction of property rights and religious liberty, along the lines discussed earlier in this Article, provides new vantages for evaluating such disputes.

CONCLUSION

Both the right to property and religious liberty are, to borrow Carol Rose’s colorful description of property specifically, particularly “hardy weed[s],” “especially attractive as a vehicle to carry other rights.”³⁰² Their tendency to sprout up even in societies

299. See Alexander, *supra* note 292, at 739 (“German constitutional law treats property as a derivative, or instrumental, value in the general constitutional scheme. It strongly protects a particular property interest only to the extent that the interest immediately serves other, primary constitutional values—in particular, human dignity and self-governance.”). Alexander makes a similar point in *Commodity and Propriety*, where he traces through American history a conception of property as “the material foundation for creating and maintaining the proper social order, the private basis for the public good.” ALEXANDER, *supra* note 4, at 1.

300. Jedediah Purdy suggests what I take to be a similar relationship when he writes: “The idea that property and the markets it sets in motion are institutions for integrating distinct but complementary dimensions of freedom is still a valuable one for defining and allocating claims on resources.” See PURDY, *supra* note 5, at 116; see also Hanoch Dagan, *The Utopian Promise of Private Law*, 66 U. TORONTO L.J. 392, 409 (2016) (contending that “the proper configuration of our private law of holdings must rely on its [autonomy-enhancing] *telos*”).

301. See *supra* notes 299-300 and accompanying text.

302. Rose, *supra* note 11, at 363 (“Virtually all peoples of whom we have any knowledge have invented property regimes for themselves in order to manage the resources they find important.”).

that attempt to forbid them suggests these rights—each in their own distinct manner—reveal something important about human nature and desire and that, to the extent they survive and thrive, other rights are likely to follow.³⁰³ Property rights and religious freedom play distinct and at times complementary roles in limiting the power of the state and protecting individual rights more generally. However, this Article has argued they mainly do so indirectly, through their role in enabling the formation and continued existence of a range of normative communities. The recognition of this important role calls for stronger protections for the property rights and religious liberty of such communities across a range of contexts.

303. See, e.g., HARVEY COX & DAISAKU IKEDA, *THE PERSISTENCE OF RELIGION: COMPARATIVE PERSPECTIVES ON MODERN SPIRITUALITY* (2009); W.S.F. PICKERING, *DURKHEIM'S SOCIOLOGY OF RELIGION: THEMES AND THEORIES* (James Clarke & Co 2009). Samuel Moyn, in analyzing the history of human rights, remarks that “it is probably the right of possession that has been the most frequently asserted and doggedly fortified right in world history.” MOYN, *supra* note 194, at 17.